January 12 , 2006

Dear Bar President:

I write, on behalf of the Justices, to request your comments on the recommendations contained in the Report of the American Bar Association's Standing Committee on Professional Discipline. (Committee) The Committee conducts a national program under which teams of individuals experienced in lawyer regulation examine, at the request of a state's highest court, a lawyer disciplinary system and report its findings to the court. As part of our system-wide effort to address the recommendations contained in the Monan Report, the Justices invited the Committee to assess the professional discipline system in Massachusetts.

The Report notes the strengths of the Massachusetts system, and recognizes the Board of Bar Overseers and Bar Counsel's dedication to improving our lawyer disciplinary system as well as their commitment to serve the public and the profession. The Report contains seventeen recommendations designed to provide constructive suggestions for continuing improvements to our system. As of today the Report, and a copy of this letter, are available on the Court's website at www.mass.gov/courts/abareport06.pdf.

In general, after a preliminary review, the Court is inclined to consider favorably those recommendations that would make the handling of disciplinary matters more expeditious and straightforward. These would include the following, which are also supported by the Board of Bar Overseers and Bar Counsel :

Recommendation 2: The Office of Bar Counsel must continue to eliminate delay in the processing of cases and develop protocols to ensure caseload currency;

Recommendation 3: Delay at the Hearing Committee and board levels of the system should be addressed;

Recommendation 4: All volunteers in the disciplinary system should receive more formal training;

Recommendation 6: The Court should consider amending Supreme Judicial Court Rule 4:01 to create a process by which petitions for discipline on matters involving lesser misconduct are handled on an expedited basis;

Recommendation 7: The Court should eliminate the use of private admonitions after the filing of a petition for discipline and further streamline the rules relating to administration of admonitions;

Recommendation 8: The rules of the Board of Bar Overseers should be amended to change the manner in which pre-hearing motions are ruled upon, to require pre-hearing conferences and to permit encouragement of settlement at such pre-hearing conferences;

Recommendation 11: The rules relating to reinstatement proceedings should be amended to ensure decisions are prompt and to protect sensitive information contained in the questionnaire from public disclosure;

Recommendation 13: The Supreme Judicial Court should adopt a Rule creating an alternatives to discipline program; and

Recommendation 16: The Supreme Judicial Court should continue to use, and the rules of the Board of Bar Overseers should be amended to require, hearing committees, special hearing officers and the board to use and cite to the ABA Standards for imposing lawyer sanctions.

The Justices also would be receptive to the study suggested in

Recommendation 17: The Court should study whether to institute the mandatory arbitration of lawyer/client fee disputes in the future.

While the Court would welcome your thoughts on any aspect of the Report, because the Report is lengthy and detailed, we direct your particular attention to those recommendations which suggest additional changes to the structure and procedures of the system. These are areas where the Board of Bar Overseers and Bar Counsel either believe further study is warranted or do not agree with the ABA's recommendations:

Recommendation 1: The Court should create an oversight committee of the Board of Bar Overseers;

Recommendation 5: The Court should repeal section 15 and related sections of

Supreme Judicial Court Rule 4:01 to eliminate resignations by lawyers under disciplinary investigation and should amend Rule 4:01 to consolidate procedures for discipline on consent;

Recommendation 9: Supreme Judicial Court Rule 4:01 and the rules of the Board of Bar Overseers should be amended to liberalize discovery;

Recommendation 10: Supreme Judicial Court rule 4:01 and the rules of the Board of Bar Overseers should be amended to streamline appeals at various levels of the disciplinary process;

Recommendation 12: The Court should consider amending Supreme Judicial Court Rule 4:01 section 18(3) to eliminate the ability of disbarred or suspended lawyers to request Court permission to work as a paralegal;

Recommendation 14: The Court should consider eliminating indefinite suspensions; and

Recommendation 15: The Court should amend Supreme Judicial Court Rule 4:01 to provide for probation and stayed suspensions as sanctions and to set forth specific requirements for the imposition, monitoring and revocation of probation.

Your members' views on how the Report's recommendations would meet the needs of the bar and the public in the Commonwealth will be most helpful to the Justices. We ask that you submit your comments, to the attention of Patricia Giblin, Supreme Judicial Court, John Adams Courthouse, One Pemberton Square, Boston, MA 02108-1750, no later than March 31, 2006. Your assistance is much appreciated.

Yours sincerely,

Margaret H. Marshall

MASSACHUSETTS

Report on the Lawyer Regulation System

October 2005

Sponsored by the
American Bar Association
Standing Committee on
Professional Discipline

MASSACHUSETTS LAWYER DISCIPLINE SYSTEM
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I. INTRODUCTION

A. The Lawyer Discipline System Consultation Program

In 1980, the ABA Standing Committee on Professional Discipline initiated a national program to confer with state lawyer disciplinary agencies upon invitation by the jurisdiction's highest court. In 1993, the Standing Committee and the Joint Committee on Lawyer Regulation made significant improvements to this program, reflecting the evolving needs of the highest courts that regulate the legal profession in each jurisdiction. The Discipline Committee has conducted over forty-five consultations since the commencement of the program.

The ABA Standing Committee on Professional Discipline's consultation program sends a team of individuals experienced in the field of lawyer regulation to examine the structure, operations and procedures of the host jurisdiction's lawyer disciplinary system. At the conclusion of its study, the team reports its findings and recommendations for the improvement of the system, on a confidential basis, to the highest court. These studies allow the state to take advantage of model disciplinary procedures that have been adopted by the ABA. The consultations also provide a means for the Committee to learn of other effective procedural mechanisms that should be considered for incorporation into current Association models.

The team examines the state's lawyer regulation system using criteria adapted from the *ABA Model Rules for Lawyer Disciplinary Enforcement* (MRLDE) as a guide. These rules were adopted by the ABA House of Delegates in August 1989 and were most recently amended in August 2002. They incorporate the best policies and procedures drawn and tested from the collective experience of disciplinary agencies throughout the country. The team uses the report and recommendations of the ABA Commission on Evaluation of Disciplinary Enforcement (the McKay Commission), as adopted by the ABA House of Delegates in February 1992, as an additional resource. These recommendations reaffirm, expand and add to many of the policies set forth in the MRLDE.

The consultation team utilizes the MRLDE and McKay Report to identify potential problem areas and to make recommendations as to how the state's lawyer regulatory system can become more efficient and effective. Team members also carefully consider national practices and local factors in fashioning recommendations. This allows the team to craft suggestions that are tailored to meet each jurisdiction's particular needs and goals.

B. Persons Interviewed and Materials Reviewed

At the invitation of the Supreme Judicial Court of Massachusetts, the ABA Standing Committee on Professional Discipline sent a team to conduct the on-site portion of the consultation from June 26 through June 30, 2005. Biographies of the team members are attached to this Report as Appendix A. Interviewees included the Bar Counsel and members of his staff, the General Counsel for the Board and his staff, staff of the Attorney and Consumer Assistance Program, members of the Board of Bar Overseers, members of the Hearing Committees, Special Hearing Officers, respondents, respondents' counsel, complainants and lawyers who have had no involvement with the disciplinary system. The team also met with the leadership of both the Massachusetts and Boston Bar Associations and the Massachusetts Lawyers Concerned For Lawyers Program. The team met with members of the Supreme Judicial Court and with the Clerk of the Court.

The team reviewed documentation relating to the lawyer regulatory system in Massachusetts. This included, but was not limited to, Supreme Judicial Court Rules 4:01, 4:02 and 4:03, the Rules of the Board of Bar Overseers, the Massachusetts Rules of Professional Conduct and the Rules of the Clients' Security Board. The team examined caseload processing information, files and training materials for the system's volunteers and professional staff.

The team read the Report of the Massachusetts Bar Association Task Force on Lawyer Discipline. The Task Force members' and the Massachusetts Bar Association's devotion of time and resources to developing suggestions for improving the lawyer discipline system is most commendable. This Report of the ABA Standing Committee on Professional Discipline is not a response to the Task Force Report. The Discipline Committee's report is an independent evaluation of the Massachusetts lawyer discipline system. The recommendations in this Report are not intended as support for or criticism of the work product of the Massachusetts Bar Association's Task Force.

The ABA Standing Committee on Professional Discipline is grateful to all the participants in the consultation for their time, effort and candor. The Committee is impressed with the Court's, the Board's and Bar Counsel's dedication to improving the system, and their commitment to serve the public and the profession. The Discipline Committee hopes that the recommendations contained in this Report will assist the Court in making continued improvements to the Massachusetts lawyer disciplinary system.

II. OVERVIEW

A. Strengths of the Massachusetts Lawyer Discipline System

This Report is designed to provide constructive suggestions based upon the ABA Standing Committee on Professional Discipline's collective knowledge and experience in lawyer regulation and the *ABA Model Rules for Lawyer Disciplinary Enforcement*. This Report generally will exclude from discussion those areas of the system that are operating effectively. In order to provide a balanced assessment of Massachusetts' lawyer disciplinary system, its strengths should be recognized. The following is not an exhaustive description of those strengths. Additional programs and initiatives of note will be described elsewhere in this Report.

The volunteer members of the Board and the Hearing Committees contribute their experience and time to the process. They strive to ensure that the process is fair and efficient. Likewise, the professional staff members of the Office of Bar Counsel and the Office of the General Counsel exhibit a commitment to fairness, efficiency of the system and protection of the public.

The Attorney and Consumer Assistance Program (A.C.A.P.), implemented in March 1999, is an important addition to the lawyer regulatory system in Massachusetts. A.C.A.P. is located within the Office of Bar Counsel. It performs the central intake function for the discipline system. The A.C.A.P. lawyers and paralegal-investigators provide a consumer friendly and sophisticated complaint screening process for written and telephone inquiries. The team recommends that this practice continue. The use of the telephone to receive and address grievances provides complainants and lawyers with a simple and direct manner by which to quickly and informally resolve these matters.

A.C.A.P. staff members have helped reduce the investigatory caseload of Bar Counsel's Office significantly by resolving minor matters without the need for the filing of a grievance or initiation of a formal investigation. For example, in Fiscal-Year 1998, Bar Counsel's Office opened 2349 complaint files. In Fiscal-Year 2004, 1081 such files were opened. A.C.A.P. receives approximately 6000 contacts each year. The team was advised that approximately 75% of those contacts are resolved informally. The A.C.A.P. staff responds to inquiries quickly. If a matter should be referred to the Bar Counsel's office, such action is promptly taken.

Bar Counsel's Office keeps complainants informed of the status of proceedings. Letters sent to complainants when an investigation is closed detail the reasons that no further action is being taken. They advise complainants of their right to appeal that decision. The practice of sending such specific closure letters is laudable. The team was advised that Bar Counsel and his staff are accessible to respondents and engage in outreach to the profession through the publication of articles and presentation of continuing legal education courses. Of note is the effort by Bar Counsel's Office to help the profession adjust to the requirements of the new Rule 1.15 of the Massachusetts Rules of Professional Conduct.

The General Counsel and the Assistant General Counsel assist the Board and the Hearing Committees with the drafting of reports and recommendations. They strive, while trying to resolve a backlog, to provide high quality work product to assist the system volunteers with their duties. Their work results in the issuance of disciplinary opinions that serve to educate the profession and the public.

Since 1999, the Office of Bar Counsel and the Board of Bar Overseers have maintained a website. In addition to information about the disciplinary system and the processing of complaints, the site contains all public discipline decisions since that time and a current developments page. The site is easy to navigate and is an excellent resource for the public and Massachusetts lawyers.

B. Components of the Massachusetts Lawyer Discipline System

The Supreme Judicial Court of Massachusetts possesses the exclusive and inherent authority to regulate the legal profession in the Commonwealth. The Court exercises this authority through its disciplinary agency. The disciplinary agency consists of: (1) the Board of Bar Overseers; (2) the Office of the General Counsel to the Board; (3) the Office of Bar Counsel; and (4) the Hearing Committees and Special Hearing Officers. The Court's rules relating to the operation and funding of the lawyer disciplinary system are contained in Supreme Judicial Court Rules 4:01, 4:02 and 4:03. Additional rules relating to the operation of the disciplinary process are contained in the Rules of the Board of Bar Overseers.

1. Nature and Funding of the Massachusetts Lawyer Discipline System

At the time of the consultation team's visit, there were approximately 48,000 lawyers registered to engage in active practice in Massachusetts. Supreme Judicial Court Rule 4:02 contains the registration requirements for lawyers. Pursuant to Supreme Judicial Court Rule 4:03, Massachusetts lawyers, except those who fall under designated exceptions, are required to pay an annual registration fee to the Board. Those monies are used to defray the costs of the operation of the discipline system. Those monies also provide funds for the Clients' Security Board and Fund and Lawyers Concerned For Lawyers, Inc. No taxpayer monies are used to fund the disciplinary agency. Additional funding of the system comes from interest, reimbursement of costs of disciplinary proceedings from respondents and late registration fee penalties.

The annual registration fee is $220 per lawyer for lawyers admitted to practice for more than five and up to fifty years. Lawyers admitted less than five years pay $160 and those admitted to practice for more than fifty years pay $20. In 2004, the annual budget for the lawyer discipline system was $8,687,748. For 2005, the annual budget is $7,906,201. The reason for the decrease in the budget between 2004 and 2005 is that the agency's new lease provides for fifteen free months' rent.

Lawyers who do not timely pay their registration fees can be suspended upon proper notice pursuant to Supreme Judicial Court Rule 4:03(2). A lawyer suspended pursuant to that Rule becomes subject to the provisions of Section 17(4) of Supreme Judicial Court Rule 4:01. The other provisions of Section 17(4) become applicable if the lawyer is not reinstated within thirty days after entry of the suspension order.

2. The Office of Bar Counsel

Pursuant to Section 5(3)(b) of Supreme Judicial Court Rule 4:01, the Board of Bar Overseers appoints the Chief Bar Counsel with the approval of the Court. The Chief Bar Counsel serves at the pleasure of the Court. With the Board's approval, the Chief Bar Counsel may employ staff, including First Assistant Bar Counsel and Assistant Bar Counsel. The Board hires the General Counsel. The General Counsel hires his staff with Board approval. Bar Counsel's Office and the General Counsel's Office, while housed in space covered by one lease, are

separate. Bar Counsel, the General Counsel and their staff recognize the need to maintain appropriate separation between prosecutorial and adjudicative functions.

The Chief Bar Counsel conducts annual performance evaluations for his staff and makes recommendations for salary increases to the Board. In addition, as discussed in more detail below, as of September 1, 2004, Assistant Bar Counsel are required to report to the First Assistant Bar Counsel about any file that has remained open for ninety days after assignment. This step was taken, in addition to others, to help reduce the longstanding caseload backlog and to increase the efficiency with which cases are investigated and prosecuted. In November 2004, Bar Counsel developed performance standards that were applicable to Assistant Bar Counsel for Fiscal-Year 2005. The team was informed that the standards will be adjusted as necessary in the future.

Pursuant to Section 7 of Supreme Judicial Court Rule 4:01 and Section 2.1 of the Rules of the Board of Bar Overseers, the Office of Bar Counsel is responsible for the investigation and prosecution of allegations of lawyer misconduct in the State. The Chief Bar Counsel's staff includes two First Assistant Bar Counsel and sixteen Assistant Bar Counsel. In addition to these lawyers, the Office of Bar Counsel is staffed by seventeen paralegals/investigators, twelve secretaries, and a receptionist. The Attorney and Consumer Assistance Program (A.C.A.P.) is housed in Bar Counsel's Office and maintains a separate docketing system. The team was advised that the Office of Bar Counsel relies on one of its senior Assistant Bar Counsel to produce statistical reports and help with other technology matters such as the website and the evaluation of new software. The Office was also able to rely on a financial investigator, who has since departed the Office, for technology advice.

In 1999, the A.C.A.P. program was launched to serve the central intake function for the Office of Bar Counsel. The purpose of the A.C.A.P. is to seek to resolve minor consumer complaints about lawyers informally prior to the filing of a grievance with the Office of Bar Counsel. Information about A.C.A.P. is available on the discipline system's website. The team was advised that the A.C.A.P. staff returns most complainants' telephone calls within twenty-four hours. If they cannot do so, the call is returned within forty-eight hours. The team was also told that matters pending before A.C.A.P. are typically resolved in thirty days. When necessary, A.C.A.P. staff refers matters to the Office of Bar Counsel. As noted above, the A.C.A.P. program has resulted in a significant decrease in the number of investigations that must be conducted by an Assistant Bar Counsel. The positive impact of the A.C.A.P. program on the disciplinary agency's caseload is continuing.

Requests for investigation submitted to Bar Counsel's Office are designated as "B" files (grievances) or "C" files (formal complaints) in accordance with Section 2.4 of the Rules of the Board of Bar Overseers. Matters are initially opened as "B" files unless the allegations are considered to be grave, the respondent has been previously disciplined or is the subject of a pending Petition for Discipline, or a previous "C" file has been opened against that lawyer for a similar alleged offense. Bar Counsel may dismiss "B" files without Board approval and must notify the complainant and respondent of such a dismissal. That notice also must advise the complainant that he/she may appeal Bar Counsel's closure to a Reviewing Member of the

Board. A Reviewing Member of the Board must approve Bar Counsel's recommendation to close a "C" file.

The Office of Bar Counsel is now structured vertically. This means that the Assistant Bar Counsel assigned to conduct the investigation is also responsible for prosecuting any Petition for Discipline that results from that investigation. Previously, the Office had been structured horizontally. One Assistant Bar Counsel investigated the allegations of misconduct and the matter was assigned to a different Assistant Bar Counsel to prosecute it. This horizontal practice contributed to the delay issues discussed in this Report. The move to a vertical system was an important one that, despite an initial learning curve, has resulted in and will continue to foster a reduction of delay in the system.

Assistant Bar Counsel are assisted by professional investigators/paralegals. Bar Counsel can subpoena records and testimony during the course of an investigation. Sections 3(1) and (2) of Supreme Judicial Court Rule 4:01 provide that respondents can be subject to discipline and administrative suspension for failing to respond to requests for information from the Office of Bar Counsel. Complainants receive letters acknowledging their complaint and notifying them that additional information is being sought, including a response from the respondent. The respondent receives written notification of the initiation of the investigation along with a request for a response and notice that the response may be sent to the complainant. Rules of the Board of Bar Overseers, Section 2.6. Section 9 of Supreme Judicial Court Rule 4:01 provides complainants with absolute immunity for their communications with the agency.

At the conclusion of an investigation of a "C" file (formal complaint), Bar Counsel may recommend to the Board that the matter be disposed of by: (1) dismissal; (2) administration of an admonition; (3) imposition of formal discipline by agreement; (4) institution of formal disciplinary charges; or (5) that the matter be closed after an adjustment, informal conference or referral to a bar association for mediation. Supreme Judicial Court Rule 4:01, Section 8; Rules of the Board of Bar Overseers, Section 2.7 (2). Bar Counsel's recommendation for dismissal, the filing of formal charges without an agreement for discipline, or imposition of an admonition is considered by a Reviewing Member of the Board. A recommendation for the filing of formal charges must be accompanied by the file, a draft Petition for Discipline and a charging memorandum. Rules of the Board of Bar Overseers, Section 2.8(b)(1) and (2). A recommendation for imposition of an admonition must be accompanied by a charging memorandum. Rules of the Board of Bar Overseers, Section 2.8 (a)(1). Bar Counsel's recommendation that formal discipline be imposed by agreement is filed directly with the Board and proceeds pursuant to Sections 3.19 (d) and (e) of the Rules of the Board of Bar Overseers.

The Reviewing Board Member may adopt, modify or reject Bar Counsel's recommendation for dismissal, imposition of an admonition or the filing of formal charges. Supreme Judicial Court Rule 4:01, Section 8(1); Rules of the Board of Bar Overseers, Section 2.8. If the Reviewing Board Member rejects or modifies Bar Counsel's recommendation, he/she must set forth the reasons for doing so on the recommendation forms provided. The Reviewing Board Member may confer with Bar Counsel when considering how to dispose of a matter at

this level of proceedings. Bar Counsel may appeal the decision of the Reviewing Board member to reject or modify his/her recommended disposition to the Board Chair. Supreme Judicial Court Rule 4:01, Section 8(1); Rules of the Board of Bar Overseers, Section 2.9. Section 2.9 of the Rules of the Board of Bar Overseers sets forth additional levels of appeal for Bar Counsel.

If the Reviewing Board Member determines that the filing of formal charges is appropriate, the Office of Bar Counsel prepares and files a Petition for Discipline with the Board. Bar Counsel's Office serves the petition on the respondent who must file an answer within 20 days. Supreme Judicial Court Rule 4:01, Section 8(3); Rules of the Board of Bar Overseers, Sections 3.13 through 3.15. After receipt of the respondent's answer, the Chair of the Board assigns the case to a Hearing Committee. The allegations of the petition are deemed admitted and the respondent may be placed on administrative suspension if the respondent fails to file a timely answer. If the allegations of the Petition are deemed admitted, the respondent waives the opportunity to be heard in mitigation and the Board considers the matter on the basis of the admitted charges. Rules of the Board of Bar Overseers, Section 3.15 (g). For good cause shown and upon the timely motion of the respondent, the Board may vacate a default and allow the respondent to answer the Petition. Rules of the Board of Bar Overseers, Section 3.15 (h).

Caseload statistics for the disciplinary agency are kept. According to the Annual Report filed with the Court for Fiscal-Year 2004, the Office of Bar Counsel opened 1,081 complaints for investigation. During that year, 73 Petitions for Discipline were filed and twenty-six matters proceeded to hearing. Each lawyer in the office maintains a caseload of approximately seventy-five matters per year (investigations and prosecutions).

Statistics provided to the team demonstrate that there is a longstanding problem with delay at this level of the system. As discussed further in Recommendation Two, part of the reason that the backlog has accumulated is unique to Massachusetts' legal culture. That being said, however, it must be noted that the Office of Bar Counsel has taken various measures to address concerns about delay in the processing of cases. Significant progress has been and continues to be made. The issue of delay at this level of the system is addressed with specificity in Recommendation Two below.

3. The Board of Bar Overseers

Pursuant to Section 5 of Supreme Judicial Court Rule 4:01, the Court appoints the Board of Bar Overseers, to consist of such number of members as the Court determines from time to time. Currently, the Board is comprised of eight Massachusetts lawyers and four non-lawyers. Board members serve staggered four-year terms and may not serve more than two consecutive terms. A former member may be eligible for reappointment after a lapse of one or more years. The Court designates one member of the Board as the Chair and another as Vice-Chair. The Board appoints the General Counsel. There are currently two Assistant General Counsel to assist the Board and Hearing Committees with the drafting of reports and recommendations.

When acting as a whole, the Board may do so only with the concurrence of a majority of its members who are present and voting. A quorum must be present. The Board has created committees to address administrative matters such as the budget and the promulgation of proposed rules for the Court's consideration. The full Board considers administrative matters, as needed, at the same monthly meeting at which it adjudicates disciplinary cases. When necessary, the Board may meet by conference call.

Supreme Judicial Court Rule 4:01, Section 5(3) sets forth the duties of the Board. These include administrative, adjudicative and investigative/prosecutorial functions. In terms of administrative functions, the Board is responsible for appointing the Hearing Committees and Special Hearing Officers and for assigning matters to them for hearing. The Board acts as the clerk for the formal disciplinary process. It maintains the official records in matters that proceed before the Hearing Committees, Special Hearing Officers, the Board and the Court. The Board employees also handle the registration requirements for the system as set forth in Supreme Judicial Court Rules 4:02 and 4:03. The Board is required to file with the Court an annual summary of each proceeding where the Board has imposed a public reprimand. The Board, with the Court's approval may adopt and publish disciplinary procedural rules to supplement Supreme Judicial Court Rule 4:01. It has done so by promulgating the Rules of the Board of Bar Overseers. The Board is also responsible for the system's budget, although the Bar Counsel and General Counsel formulate the budgets for their Offices.

The Board's adjudicative duties include approving Bar Counsel's recommendation for the dismissal of "C" files and considering complainant appeals of Bar Counsel's dismissal of "B" files. Members of the Board may also serve as the trier of fact at hearings on Petitions for Discipline or Petitions for Reinstatement via assignment to a Board Hearing Panel. Supreme Judicial Court Rule 4:01, Section 5 (3) (e). The Board considers requests by lawyers to resign while under disciplinary investigation and makes recommendations to the Court as to whether such requests should be granted. Supreme Judicial Court Rule 4:01 Section 15. The Board may approve the imposition of admonitions and may impose public reprimands. The Board may authorize the deferral of proceedings due to pending civil, criminal or administrative proceedings. Supreme Judicial Court Rule 4:01, Section 11; Rules of the Board of Bar Overseers, Section 2.13.

The Board, as a whole or acting through Appeal Panels consisting of three members, is responsible for adjudicating appeals from the reports and recommendations of the Hearing Committees, Special Hearing Officers or Board Hearing Panels. If there is no appeal of a recommendation for disbarment or suspension, and the Board approves of the recommendation, it files an Information with the Court requesting that the Court impose the recommended sanction.

In terms of investigative/prosecutorial duties, Supreme Judicial Court Rule 4:01, Section 5(3)(a) gives the Board the authority to investigate the conduct of any lawyer on its own motion or upon receipt of a complaint. In practice and pursuant to Section 5.6(c) of the Rules of the Board of Bar Overseers, these duties fall to Bar Counsel's Office. However, in the

event a complaint is made against a lawyer member of Bar Counsel's Office or the Board's staff, or against a member of the Board, Section 7 of Supreme Judicial Court Rule 4:01 and Sections 2.4 and 5.6 of the Rules of the Board of Bar Overseers require the Board to investigate and recommend the appropriate disposition of those matters.

4. The Hearing Committees and Special Hearing Officers

Pursuant to Section 2 of Supreme Judicial Court Rule 4:01, the Commonwealth of Massachusetts is divided into six disciplinary districts. Generally, hearings on formal disciplinary charges and reinstatement matters are to be held in the disciplinary district where the respondent maintains an office. The Board, Court or a single Justice may, however, direct that a disciplinary matter proceed in any district. Supreme Judicial Court Rule 4:01, Section 2(2). The team was advised that in most instances, hearings are held at the Board's offices for respondents in disciplinary districts one, two and three.

Section 5(3)(c) of Supreme Judicial Court Rule 4:01 directs the Board to appoint at least one Hearing Committee within each disciplinary district. A Hearing Committee in each district must consist of at least three individuals who reside or maintain offices in that district. The Chair of a Hearing Committee must be a lawyer. No Hearing Committee may consist of more than one non-lawyer. If the Board deems it appropriate, it may appoint a lawyer to serve as a Special Hearing Officer to hear charges of misconduct. As noted above, the Board may also hear Petitions for Discipline via the appointment of a Hearing Panel of the Board.

Hearing Committee members serve three-year terms. Their terms are staggered. No member may serve more than two consecutive terms, but a member who has served two consecutive terms may be reappointed after the expiration of one year.

Hearing Committee members, Special Hearing Officers and Board Hearing Panels act as the trier of fact in hearings upon formal charges and in reinstatement proceedings. Hearing Committees and Board Hearing Panels can act only with the concurrence of a majority of their members. Chapter 30A of the General Laws (State Administrative Procedure), including the administrative rules of evidence, apply to proceedings on formal charges. Rules of the Board of Bar Overseers, Section 3.2. The Office of Bar Counsel is required to prove the allegations in the Petition for Discipline by a preponderance of the evidence. Post-trial filings setting forth proposed findings of fact and recommendations for discipline may be filed by the parties at the conclusion of a hearing. The Rules of the Board of Bar Overseers contain specific provisions relating to the filing of pleadings and conduct of hearings on formal disciplinary charges.

Section 8(3) of Supreme Judicial Court Rule 4:01 and Section 3.46 of the Rules of the Board of Bar Overseers require the Hearing Committees, Special Hearing Officers or Board Hearing Panels to file their reports and recommendations promptly. The Board has promulgated time standards stating that the Hearing Committees, Special Hearing Officers or Board Hearing Panels should hold hearings within ninety days after assignment of the case and file their reports and recommendations within sixty days after receipt of the transcript. The time

standards do not confer any substantive rights on any party to the disciplinary proceedings. Lawyers from the Office of the General Counsel assist the Hearing Committees, Special Hearing Officers and Board members in the drafting of reports and recommendations. The team was advised that there are also delays at this level of the proceedings. This report will address concerns about delay at the adjudicative level of the discipline system in Recommendation Three.

5. The Supreme Judicial Court

The Board must file an Information with the Court if: (1) the Board (whether after appeal, without appeal or upon acceptance of a stipulation or resignation) determines that a matter should be resolved by a suspension or disbarment; (2) Bar Counsel objects to a recommendation to dismiss a Petition for Discipline; or (3) Bar Counsel or the respondent object to having the matter concluded by a public reprimand or admonition. Supreme Judicial Court Rule 4:01, Section 8 (4); Rules of the Board of Bar Overseers, Section 3.57. In addition to filing the Information, the Board must file the entire record of the proceedings below with the Clerk of the Court. Rules of the Board of Bar Overseers, Section 3.58.

A single justice of the Supreme Judicial Court is assigned by the Chief Justice to hear the matter and issue an order. Either party may appeal that order to the full Court. The full Court then hears the matter and issues an opinion.

III. STRUCTURE AND RESOURCES

Recommendation 1: The Court Should Create An Oversight Committee of the Board of Bar Overseers

Commentary

Ultimate oversight of the discipline system resides with the Supreme Judicial Court of the Commonwealth of Massachusetts. The Court has demonstrated a commendable interest in seeing that the system operates in a manner that is protective of the public and fair to the profession. The Court, the Board, the General Counsel's Office and the Office of Bar Counsel are all dedicated to ensuring that the discipline system is open, fair, responsive and accountable. However, delay at various levels of the process threatens the ability of the system to operate efficiently and effectively. Interviewees were unanimous in their expressions of concern about delay in the disciplinary process. The team spent substantial time studying this issue and listening to the suggestions of those interviewed to address it. The team was impressed by the determination of everyone involved with the system to eliminate delay.

The team believes that creating an appropriate administrative oversight mechanism that interacts directly with the Court through a liaison justice will help ensure that the entire system operates as effectively and efficiently as possible. The team recommends that the Court amend Supreme Judicial Court Rule 4:01, Section 5, to create a separate administrative Oversight Committee of the Board. This Oversight Committee would be responsible for general administrative oversight of the entire system, focusing on the efficiency of processing cases at the investigative, hearing and appeal levels, resource planning for the agency, public education and outreach, training of system volunteers (see Recommendation Four), and, in addition to the Chief Bar Counsel, proposing new disciplinary rules to the Court. New rules that may be proposed to the Court by the Oversight Committee should may include rules to establish preventive mechanisms such as random audit of client trust accounts and third party payee notification of the issuance of settlement drafts.

In making this recommendation the team is not criticizing the oversight work of the Board to this point. Bar Counsel and the General Counsel currently meet monthly with the Board to discuss matters relating to caseload management, but the team was advised that most of the Board's oversight relates directly to its own functioning not the system as a whole. The bulk of the Board's time appears to be spent fulfilling its various adjudicative duties. The team believes that this is where the time of these twelve volunteers is best spent.

The team recommends that the Court appoint the members of the new Oversight Committee. The members of this Committee should have no role in adjudicating matters. The team recommends that the Court appoint a liaison justice to this entity. The Court may wish to rotate that liaison every few years. This entity should consist of at least five members. There should be two public members on the Oversight Committee. If the Court solicits

recommendations from the bar for the lawyer positions, it should also solicit input from the public. The Court should consider appointing members of the Oversight Committee for three-year terms, with no member serving more than two consecutive terms.

A. Resource Planning

The team recommends that the Chief Bar Counsel and the General Counsel continue to develop the budgets for their respective offices. This is consistent with national practice and reflects the fact that they are in the best position to do so. They should submit their budgets to the new Oversight Committee for submission to the Court. In the unlikely event there is a disagreement between the Oversight Committee and the Chief Bar Counsel or General Counsel regarding their budgets, Bar Counsel and General Counsel should be permitted to submit their budgets directly to the Court. These instances should be rare, and all efforts should be made to resolve budget issues without the need for the Court to do so.

The team was not advised of any current concerns relating to the financial stability of the disciplinary system. However, in order to determine adequate financing for the system well into the future, the new Oversight Committee should work with the Chief Bar Counsel and the General Counsel to prepare a true needs assessment setting forth a proposed three to five year funding plan for the system. As discussed below, this includes ensuring that salaries for the professional staff are competitive enough to attract and retain experienced individuals. If necessary, a financial planner or budget analyst should be used to assist in assessing the current and future needs of the system in terms of finances, technology and staffing.

Based on national experience, the team recommends that financial planning for the discipline system should ensure that regulatory fees remain stable for a period of time such as a three to five year or longer cycle. Once provided with a long-range financial plan for the future funding of the system, the Court can determine how to phase in necessary increases to the regulatory fee. The team understands that the registration fee in Massachusetts has not been increased for some time. It is appropriate for a disciplinary agency to maintain a reserve. The team was advised that the agency has a reserve equal to three months of its operating expenses. This is commendable and that reserve should be maintained.

B. System Administrative Oversight

The duties of the Oversight Committee should include ensuring that the Hearing Committees and the adjudicative Board operate efficiently and that their reports and recommendations are timely filed. The team commends the Board's creation of time standards for holding hearings and filing Hearing Committee reports. The team suggests similar standards for the appellate process, including the filing of the Board's reports and recommendations. If a Hearing Committee member or Special Hearing Officer is unable to complete his/her work in a timely fashion, the Oversight Committee should be able to rectify the situation. The Oversight Committee should also develop a protocol for the selection of Hearing Committee members. This should include solicitation of lawyer and public volunteers through an open, well-publicized nomination process.

The Oversight Committee of the Board should work with the General Counsel to ensure the appropriate prioritization of cases awaiting the drafting of reports and recommendations. The General Counsel should propose to the Board realistic and meaningful time standards for the preparation of those reports by the Assistant General Counsel. These time standards would be internal and aspirational only and would not confer any substantive rights upon the parties. The team understands that there is currently a backlog of reports waiting to be drafted by those lawyers or by the system volunteers. The team recognizes that a major cause of that backlog is the increase in cases at the hearing level that was created by the Office of Bar Counsel's efforts to eliminate its backlog. The General Counsel's Office and the volunteers are working to achieve currency in the adjudicative caseload.

The team suggests dividing cases by level of complexity to help direct resources more appropriately for opinion writing. Reports and recommendations for cases that involve less complex fact scenarios, more stipulated facts and less serious sanctions should not take as long to draft as those matters that are complex or highly contested.

The Oversight Committee should also work with the General Counsel to ensure that his Office is adequately staffed and resourced. It is likely that the current backlog at that level will continue for a period of time, not because of insufficient efforts to eliminate it, but because of the increased caseload described above. This scenario may require additional resources for the Office of the General Counsel until the adjudicative backlog is resolved.

In terms of oversight of the investigative and prosecutorial functions of the agency, the Chief Bar Counsel should remain responsible for the day-to-day operations of his office, including management of staff and the setting of investigative and prosecutorial priorities. The Oversight Committee's general administrative duties relating to efficient caseload management should <u>not</u> allow inquiry into the investigation or prosecution of any specific matters. The Oversight Committee should receive caseload management reports from the Chief Bar Counsel and review them with him monthly. These regular meetings should help prevent the redevelopment of a backlog of matters. The caseload reports should indicate the type of misconduct alleged, whether the facts and evidence are complex in nature, the work already completed, the nature and extent of the investigation that needs to be performed and an estimate of how long that will take. Similar reports should be prepared for cases pending before the Hearing Committees and Board.

The Oversight Committee of the Board should be able to advise the Chief Bar Counsel that it wishes to see a certain percentage decrease in pending aged files within a certain period of time. The Chief Bar Counsel should be responsible for ensuring that the Oversight Committee's goal is met and determining how his staff will meet that goal. The Oversight Committee should be responsible for conducting, on behalf of the Court, an annual performance evaluation of the Chief Bar Counsel. The Chief Bar Counsel should remain responsible for hiring and evaluating his own staff and should continue to serve at the pleasure of the Court.

C. Outreach

The Oversight Committee of the Board should be responsible for coordinating outreach to the profession and the public about the discipline system. Public access to the lawyer disciplinary system is vital. The agency should be as accessible as possible to the public. The office should be easily accessible to those who are seeking to file a grievance. This means that the public should be provided with the means to easily identify the agency as the appropriate office with which to file a complaint about lawyer misconduct. The team was advised that potential complainants have experienced difficulty identifying the office as the place to file a complaint about a lawyer. Despite the existence of a very good website, members of the public who wish to file a complaint often learn about the existence of the office from other lawyers or from other entities such as the courts or bar associations.

Pamphlets describing the system do exist but do not appear to be widely disseminated to locations frequented by the public such as libraries. The pamphlet provided to the team incorrectly stated that, until public discipline is imposed by the Court, the Board and Bar Counsel may not disclose that a complaint has been filed except under certain circumstances set forth in the rules. This conflicts with Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers about the public nature of Petitions for Discipline. The Oversight Committee of the Board could ensure that the pamphlets are drafted in a more consumer friendly tone and that they are placed in locations such as courthouses and public libraries and that they are available to consumer organizations. Members of the Oversight Committee might also meet with news media in the state to discuss the disciplinary system.

Bar Counsel's Office and staff of the A.C.A.P. are necessary components of any successful public outreach and education effort by the Board of Bar Overseers. Bar Counsel's Office already engages in significant outreach to the bar. The system's professionals and also its volunteers should speak regularly about the system to the bar. They should also engage in a concerted effort to address the public. In particular, they should seek invitations to speak at meetings of consumer organizations and citizens groups, as well as bar associations.

Recommendation 2: The Office of Bar Counsel Must Continue to Eliminate Delay in the Processing of Cases and Develop Protocols to Ensure Caseload Currency

Commentary

A. Background

As discussed throughout this Report, delay at any level of the disciplinary process threatens the ability of the system to operate efficiently and effectively and must be eliminated. A consistent theme among interviewees, including staff and volunteers of the agency, was the issue of delay. The Committee again thanks all those who spoke with the consultation team for their candor and for their willingness to engage in the type of self-reflection that is needed to successfully tackle this problem. Those who assisted the team via the interview process also provided valuable suggestions for how to reduce delay in the system.

It is fair to say that, based upon the team's interviews and review of records, the area where delay has been most prevalent over the years is at the investigative stage. The team tried to determine what caused this institutional problem that developed over a period of many years. The team did this not to affix blame, but to help it to develop useful suggestions for supplementing the already concerted effort by Bar Counsel and his staff to obtain currency in the caseload. The team was informed that delay has flourished due to a combination of factors including cultural attributes unique to the Massachusetts legal system, the need for improved protocols for prioritization of cases and delegation of duties, and resource issues.

The team recognizes the toll that disciplinary proceedings takes on lawyers, emotionally and fiscally. However, those who are the subjects of investigation and/or prosecution by the agency also play a role in perpetuating delay. This is not a popular statement to make, but it is a reality in lawyer discipline proceedings nationwide. This Report would not be complete if it did not recognize that there are instances where respondents and their lawyers use delay tactics to prolong the investigation/prosecution of matters by Bar Counsel's Office for as long as possible so that they may continue in practice.

Another factor that has led to matters taking too long to proceed through the system is the practice of deferring cases. Section 11 of Supreme Judicial Court Rule 4:01 allows the Board, at the request of Bar Counsel or the respondent, to defer investigation or prosecution of disciplinary matters due to the pendency of civil or criminal proceedings relating to the respondent. Statistics reviewed by the team indicate that cases have remained in a deferred status for many years. As of September 1, 2005, there existed one ten year old deferred file, one seven year old deferred file and seven files that have been deferred for five and six years. As the Board must approve a request for deferral, the new Oversight Committee of the Board should determine how this process could be used more judiciously and how the existing interim suspension rules could be used to protect the public during the period of deferral. This

includes developing a mechanism for intermittent review of deferred matters to ensure that they do not remain in abatement for indefinite periods of time.

B. Efforts by Bar Counsel to Eliminate Delay

Bar Counsel and his staff have undertaken efforts to eliminate the caseload backlog and create processes to help the Office maintain a more current caseload. Institution of the extremely productive and efficient A.C.A.P. program has significantly reduced the matters that Bar Counsel must investigate. The Chief Bar Counsel has instituted the ninety-day file review process and quarterly reviews with all employees. He has also developed performance standards for all the Assistant Bar Counsel.

The Chief Bar Counsel also restructured the office from a "horizontal" to a "vertical" operation. As a result, the delay caused by the prosecuting lawyer having to learn the case upon transfer from the investigative lawyer and close any gaps in proof via additional investigation has been eliminated. The transition to the vertical system required staff to make significant adjustments. They have made those adjustments admirably and the vertical handling of cases is helping the system operate more efficiently.

Statistics provided to the team demonstrate the Office of Bar Counsel's progress. In March 2002, there was a backlog of 119 respondents who had investigative files open for more than three years. Since that time, Bar Counsel began a systematic review process that has allowed supervisors to better communicate goals and priorities to staff and to better focus investigations. These efforts have borne fruit. As of August 31, 2005, there remained 35 respondents with investigative files open for more than three years. Of that number, 14 are in held or deferred status. There is still work to be done.

C. The Process of "Holding" Some Files Should Be Eliminated

In addition to files that are deferred with Board approval pursuant to Section 11 of Supreme Judicial Court Rule 4:01, the Office of Bar Counsel engages in a practice of "holding" files. The team was advised that the Office places matters in "held" status under various circumstances. A circumstance the team finds troubling is when there are multiple investigative files against the same respondent and Bar Counsel decides to file a Petition for Discipline based on some but not all of those investigative files. The files not included in the Petition are placed on "held" status until Bar Counsel's Office learns if its prosecution is successful. The team was informed that if Bar Counsel's Office wins, the held files are usually closed, unless any of them would warrant additional discipline. If Bar Counsel's Office loses, it may decide to seek Board permission to prosecute charges relating to the files that have been held in abeyance. The team was advised that a file may also be placed in "held" status when a lawyer is indicted and the Office of Bar Counsel is waiting for the criminal proceedings to conclude. This reason for placing a file on "hold" is understandable, and does not raise the same concerns about fairness as the circumstances described above.
The Office of Bar Counsel keeps statistics for "held" matters by the number of files and the number of respondents. The number of files in "held" status necessarily exceeds the number

of respondents with matters in "held" status. Statistics provided to the team indicate that in 2002 there were 94 held files relating to 26 respondents. Those numbers have risen each year. As of August 31, 2005 there were 222 held files relating to 53 respondents.

The team recognizes that there are legitimate reasons for placing a file on "held" status. However, the Office's practice of holding investigative files in abatement to see if it prevails on a Petition for Discipline based upon the allegations contained in other files alleging misconduct by that lawyer should be reviewed and necessary modifications made. The Court and the Board should direct the Office of Bar Counsel to do so immediately. Bar Counsel's Office should conduct its investigations promptly and thoroughly and file Petitions for Discipline on matters that warrant such action. This is not to say that the team recommends overcharging a respondent by alleging every possible disciplinary violation that might be warranted after an investigation. The Office of Bar Counsel must exercise discretion in determining which allegations to include in a Petition for Discipline.

D. Internal Time Standards

Statistics provided to the team indicate that, in 2003-2004, approximately 8.5 months elapsed on average between the time a matter was assigned to Assistant Bar Counsel and was dismissed after investigation. The average period of time it took from assignment of a case to forwarding a request for an admonition to a Reviewing Board Member was 544 days. Given the minor and remedial nature of misconduct leading to admonitions, this is far too long. Data for 2003 through 2004 also indicate that it took an average of 743 days from assignment to an Assistant Bar Counsel to filing with the Board a recommendation to file formal charges. Again, this number exceeds the national average. However, these statistics did not differentiate between routine and complex matters.

In addition to the performance standards discussed above, the team recommends that the Office of Bar Counsel create internal time standards to provide guidelines for conducting investigations and prosecutions. These internal, aspirational time standards would not act like a statute of limitations. They would be directory and not jurisdictional, conferring no rights upon the respondent. Respondents could, however, continue to raise the doctrine of laches as an affirmative defense. The National Organization of Bar Counsel promulgated recommended guidelines for the processing of cases that are noted in the commentary to Rule 11 of the *ABA Model Rules for Lawyer Disciplinary Enforcement*. They provide that, generally, the evaluation, investigation and filing and service of formal charges for routine matters should take place within six months. More complicated cases should take no more than twelve months, with interim suspensions pursuant to Sections 12 and 12A of Supreme Judicial Court Rule 4:01 to be considered when appropriate.

E. Bar Counsel Should Be Granted Discretion Not To Open and To Close Files

Currently, Bar Counsel is required to open an investigative file (likely a B"file), even if a complainant has been informed by A.C.A.P. that the allegations do not rise to the level of a

grievance or fall outside the jurisdiction of the agency. The team was advised that giving Bar Counsel the discretion not to open files on these matters would eliminate approximately 100 files from the docket of the Office. The team recommends that Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers be amended accordingly and understands that a proposed rule amendment to that effect is already pending before the Court. Complainants should still have the opportunity to appeal to a Board member Bar Counsel's decision not to open a file and should be provided with a written explanation as to why Bar Counsel declined to open a file. Rule 31, *ABA Model Rules for Lawyer Disciplinary Enforcement.*

The Court should also amend its Rules to eliminate the distinction between "B" and "C" files. Bar Counsel's Office should be able to dismiss a matter upon conclusion of an investigation without having to seek approval from a Reviewing Board Member. Rule 11(A) and (B), *ABA Model Rules for Lawyer Disciplinary Enforcement.* Such a change would also result in the need for amendments to the Rules of the Board of Bar Overseers. The lawyers in the Office of Bar Counsel are professionals, and they conduct thorough investigations. The portions of Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers that permit complainants to appeal a dismissal by Bar Counsel should remain.

F. The Office of Bar Counsel Should Be Adequately Staffed and Resourced

As of September 1, 2005 ten of the existing Assistant Bar Counsel were to be assigned an individual investigator/paralegal. The remaining three paralegals/investigators would each serve two Assistant Bar Counsel. The work of the investigators/paralegals is vital to the efficient handling of matters. The experience levels of the investigators/paralegals varies, but the Office of Bar Counsel strives to hire individuals with experience. The team was informed that, unfortunately, the salary ranges for these positions make it difficult for the agency to attract and retain experienced staff. Thus, the Office cannot compete with the private sector. *See*, Recommendation One, Paragraph A at page 15 of this Report. The Chief Bar Counsel and the proposed Oversight Committee of the Board should evaluate the salary structure for investigators/paralegals and make necessary adjustments that would facilitate the hiring and retention of qualified and experienced individuals.

Also, the team believes that the level of work that is being done by A.C.A.P., with the addition of the alternatives to discipline program suggested in Recommendation Thirteen, warrants a reevaluation of the adequacy of resources for that part of the Office of Bar Counsel. Additional lawyers may be needed for the A.C.A.P duties. As set forth in Recommendation One, the Chief Bar Counsel should work with the proposed Oversight Committee to ensure that his office is adequately staffed and resourced. The needs assessment suggested in that Recommendation will help the Chief Bar Counsel and the Oversight Committee reach the best decision in this regard.

While all lawyers in the Office of Bar Counsel have computers and an e-mail system, the team believes that further technological enhancements are necessary to help Bar Counsel's Office run more efficiently. The Office of Bar Counsel currently relies on one of its Assistant

Bar Counsel to create caseload management reports. That individual also oversees the website and serves as the Office's primary internal resource on technology issues. This takes away from the time that individual has to devote to the investigation and prosecution of matters. Further, the system appears not to have the type of up-to-date caseload management software programs that many other disciplinary agencies throughout the country use to help ensure that matters proceed as expeditiously as possible.

The Office of Bar Counsel should be provided with the resources to retain the services of a qualified information systems and software expert. That individual could consult with other lawyer disciplinary agencies and help the Office purchase and maintain a modern caseload management system. This system would enable Bar Counsel's Office to promptly generate appropriate and accurate reports describing the status of and the length of time that matters have been pending at every stage of proceedings. The team recommends that the Office of Bar Counsel consult with the disciplinary agencies in Illinois, Louisiana and Colorado regarding their data systems. Those jurisdictions have developed or purchased programs that are well suited to the functions of a disciplinary agency.

Recommendation 3: Delay At The Hearing Committee And Board Levels of the System Should Be Addressed

Commentary

In Recommendation One, the consultation team offers some suggestions as to how the proposed Oversight Committee of the Board can assist in reducing delay at the adjudicative level of the system. Those recommendations relate to the drafting of reports and recommendations after the trial and appeals have been heard.

During the course of the on-site portion of the consultation, the team queried those interviewed about other issues that cause delay at the adjudicative level of the system. The primary concern identified was one that affects all systems that use volunteers: scheduling. Concerns expressed about the scheduling of hearings related not only to difficulties that arise in trying to coordinate the schedules of busy volunteers—lawyers and non-lawyers alike—but with respect to the need to have more hearings with consecutive trial dates.

With respect to issues relating to the coordination of volunteer members' calendars, the team commends the Board for its increased use of Special Hearing Officers at a time when there is a backlog of formal disciplinary matters awaiting trial. This should continue until the backlog is eliminated. Once the backlog is eliminated, the team recommends that hearings again be assigned to three member Hearing Committees to ensure public member participation. The system's public members provide a valuable perspective.

The team believes that the Court can help address some scheduling issues and enhance the profession and public's trust in the fairness of the system by amending Supreme Judicial Court Rule 4:01 to require the creation of a statewide pool of Hearing Committee members. The Court should also amend Sections of Supreme Judicial Court Rule 4:01 to eliminate the provisions that state that hearings should generally occur in the disciplinary district where the respondent maintains his/her office and that the Hearing Committee members should be drawn from that district. As noted above, hearings for lawyers in disciplinary districts one through three already occur at the Board's Boston offices. Holding all disciplinary hearings at the Board's offices should help reduce any public distrust of the system by eliminating the perception that the respondent is receiving a "home field advantage." Those interviewed by the team recognized this danger and the consequent risks to the public's perception of the objectivity of the system.

The proposed Oversight Committee of the Board should strive to increase the number of Hearing Committee members available to serve on this proposed statewide panel. The Court may wish to offer, if it does not do so already, continuing legal education credit for lawyers who volunteer to serve as Hearing Committee members. As noted in Recommendation One, the Oversight Committee should develop protocols for the recruitment of qualified and

available Hearing Committee members. Special Hearing Officers should continue to be drawn from this statewide pool.

In order to further address delay in the scheduling of hearings, the team recommends that the Oversight Committee of the Board institute a practice whereby the dates for hearings and appellate oral arguments are reserved at least one year in advance. The Administrator of the Louisiana Attorney Disciplinary Board resolved similar scheduling concerns in this manner and possesses a computer software program that permits this do be done with relative ease. As a result, volunteers in that jurisdiction are advised at least fifteen months in advance when they are scheduled to conduct these proceedings. This allows the volunteers to set their schedules and the system to resolve scheduling conflicts well ahead of time. This should also allow scheduling consecutive hearing dates. Disciplinary hearings may take longer than one day. It is very important that whenever possible, multi-day hearings are held on consecutive days so that memories and witnesses are not overburdened. Scheduling consecutive hearing dates should also eliminate additional delay caused by having to relearn the case every time the hearing is scheduled to continue.

The team recognizes that the staff and volunteers in the system, as well as respondents and their counsel, are busy and that conflicts will arise. The team understands that Hearing Committee Chairs are sympathetic to the other obligations of their colleagues and the parties. However, the team was also advised that multiple continuances due to scheduling issues are granted too often. Section 3.7 of the Rules of the Board of Bar Overseers states that all formal proceedings should be conducted as expeditiously as possible. Hearing Committee Chairs need to be more judicious about granting multiple continuances, and the proposed Oversight Committee of the Board should ensure that the practice is used appropriately. Frequent continuances reduce the effectiveness of the disciplinary system and are not protective of the public.

The team was told that sometimes, judges from other tribunals, because they do not view disciplinary proceedings as a priority compared to other judicial matters, schedule trials or other proceedings on dates when respondents and respondents' counsel are already committed to appear before a Hearing Committee or the Board. As a result, these lawyers must request last minute continuances from the Hearing Committees or the Board. The Court should take steps to ensure that all Massachusetts judges understand that disciplinary proceedings take priority over civil proceedings.

Another concern that was raised by interviewees relates to situations where the Hearing Committees or Special Hearing Officers delay closing arguments until after the filing of post-trial proposed findings of fact and conclusions of law. While these post-trial filings may be helpful to the trier of fact, there is no reason to delay closing argument until they have been filed. Closing arguments by the parties should be made after the close of the evidence in accordance with Section 3.42 of the Rules of the Board of Bar Overseers.

Recommendation 4: All Volunteers In The Disciplinary System Should Receive More Formal Training

Commentary

The team was advised that volunteer Hearing Committee members attend annual training sessions, but none of the training sessions are mandatory. The team was told that usually only new members attend. The team reviewed the training materials that are provided to Hearing Committee members. They are well prepared, comprehensive and useful. The team was advised that there is similar training for Board members. Some of the Board members are former Hearing Committee members, and, as a result, have received more training.

The proposed new Oversight Committee for the system should oversee the development and updating of training materials and programs for system volunteers by the Office of the General Counsel. Additionally, respondents' counsel can provide valuable insights to system adjudicators.

Training helps to ensure consistency in and the expeditious resolution of disciplinary matters. Training should be mandatory for all new volunteers in the system, and should occur at least bi-annually for all other volunteers. Training should stress the need for the volunteers to fulfill their duties in a timely manner so as to enhance the public's perception that the system is operating efficiently. This should include training for Hearing Committee Chairs about their obligations to grant continuances judiciously so that the proceedings are not delayed and to control any discovery abuses. Board and Hearing Committee members should also receive training regarding substance abuse, gambling and mental health issues. These issues are raised with increased frequency in disciplinary cases.

The training of the professional staff of the Office of Bar Counsel and the system's adjudicators should continue to include attendance at National Organization of Bar Counsel meetings and at the ABA National Conference on Professional Responsibility. The NOBC is an affiliated organization of the ABA. The NOBC meetings are held in conjunction with the ABA Midyear and Annual Meetings. Resources provided by the NOBC include briefs, pleadings and educational presentations at the meetings to help jurisdictions with the implementation of more efficient and effective regulatory enforcement mechanisms.

IV. PROCEDURAL RULES

Recommendation 5: The Court Should Repeal Section 15 and Related Sections of Supreme Judicial Court Rule 4:01 to Eliminate Resignations By Lawyers Under Disciplinary Investigation and Should Amend Rule 4:01 to Consolidate Procedures for Discipline on Consent

Commentary

The team recommends that the Court repeal its Rules relating to resignations by lawyers under disciplinary investigation and order the Board to repeal the relevant Rules of the Board of Bar Overseers. Rules relating to discipline on consent, including disbarment by consent should be consolidated into one Rule that encompasses the entire range of public sanctions. Discipline on consent should be encouraged. A Rule for discipline on consent should set forth simple procedures by which a respondent can admit to misconduct in exchange for a form of discipline that Bar Counsel agrees with. *See,* Rule 21, *ABA Model Rules for Lawyer Disciplinary Enforcement*.

Discipline by consent that results in the lawyer withdrawing from the practice of law should be recorded and treated as disbarment, not as resignation. A lawyer who commits misconduct serious enough to warrant disbarment should not be allowed to claim later that he or she voluntarily resigned his or her license to practice law. Such an option creates the perception that the Court and the profession do not view the misconduct as serious. It also creates problems in reciprocal disciplinary enforcement with the vast majority of jurisdictions that have eliminated the option of resigning with charges pending in favor of adopting rules for disbarment on consent.

A. Resignations With Charges Pending Currently Appear to Be Tantamount to Disbarment on Consent

Currently, Section 15 of Supreme Judicial Court Rule 4:01 provides that a lawyer who is the subject of a disciplinary investigation may resign his or her law license by submitting to the Board an affidavit and request to resign. The process for resignations is strikingly similar to that set forth in Section 8 (5) of Supreme Judicial Court Rule 4:01 for disbarment on consent. The affidavit accompanying the request for resignation must contain an acknowledgement that the lawyer freely and voluntarily submitted the resignation and did so with full awareness of the consequences of that action. The affidavit must also state that the lawyer is aware of the pending investigation by the Office of Bar Counsel, that the allegations of misconduct that

are the subject of the investigation are true or can be proved by a preponderance of the evidence and that the lawyer waives the right to a hearing.

In resignation proceedings, the Board is required to file the affidavit with the Court along with its recommendation for Court action. Resignation proceedings are public. Lawyers whose resignations are accepted by the Court must comply with the provisions of Section 17 of Supreme Judicial Court Rule 4:01 that relate to the duties of disciplined lawyers just like lawyers who have been disbarred.

Chapter 4, Section 4.1 of the Rules of the Board of Bar Overseers requires the Board, upon receipt of the affidavit and request for resignation, to serve those documents on Bar Counsel. The Rules allow Bar Counsel seven days or more, if the Board permits, to file a statement setting forth the Bar Counsel's position as to how the Board should proceed with the request. That statement is served upon the respondent. The team was informed that, in practice, resignations are usually forwarded to the Board by Bar Counsel's Office after they are obtained from respondents who wish to avoid further proceedings.

Section 4.1 of the Board's Rules provides that the Board may order any hearing or investigation that it deems appropriate. However, Section 15 of Supreme Judicial Court Rule 4:01 states that the respondent waives his or her right to a hearing in resignation proceedings. Given that one purpose of consensual discipline is to expedite the disciplinary process, the team does not believe that it makes sense to have the Board order a hearing. The documents submitted by the parties for any type of discipline on consent should contain sufficient information for the Board to promptly render its decision on the basis of the pleadings.

A request for resignation may be submitted after the filing of a Petition for Discipline or before the filing of formal charges. The team was informed that in some instances, requests for resignation have been submitted after the issuance of an order of temporary suspension, but before the filing of a Petition for Discipline.

While the team's review of case law and decisions published at the Board of Bar Overseer's web site was not exhaustive, it appears that the submission of a request for resignation generally results in a Board recommendation for and an ultimate order of disbarment by the Court. *See, e.g., Matter of re Wager*, No. BD-2003-061 (January 16, 2004); *Matter of Rosen*, No. BD-2003-050 (September 2, 2003); *Matter of O'Sullivan*, No. BD-2000-066 (November 14, 2001); and *Matter of Golenbock*, No. BD-1999-024 (May 30, 2001). In the past, the term "resignation in lieu of disbarment" appeared on orders. Information provided to the team also indicates that in cases where disbarment is not warranted or extensive mitigating circumstances exist, an order may state that the resignation is accepted in lieu of suspension or in lieu of discipline.

Further indication that resignations are intended to be more analogous to disbarment is found in Section 18 (2) of Supreme Judicial Court Rule 4:01. Section 18(2) provides that a lawyer who has resigned his or her license may not petition for reinstatement to the practice of law until the expiration of at least eight years from the effective date of the resignation. This is

the same period of time that must elapse before a disbarred lawyer may petition for reinstatement.

B. Encouraging Discipline on Consent and Streamlining Existing Procedures

As noted above, pursuant to Section 8 (5) of Supreme Judicial Court Rule 4:01 another existing form of consensual discipline in Massachusetts is disbarment on consent. In addition to disbarment on consent, Bar Counsel may recommend to the Board after the completion of an investigation that formal discipline be imposed by agreement. Supreme Judicial Court Rule 4:01, Section 8(1)(b). A recommendation that formal discipline be imposed by agreement is submitted directly to the full Board. Pursuant to Section 8(3) of Supreme Judicial Court Rule 4:01, after the filing of a Petition for Discipline, if the respondent files an answer admitting the charges and does not request a hearing on mitigation, Bar Counsel and respondent may jointly recommend that a reprimand or suspension be imposed. If the Board accepts the recommendation for a reprimand, it may administer that sanction. If the Board accepts the joint recommendation for suspension, the matter is filed with the Court. If the Board rejects the proposal for an agreed reprimand or suspension, the matter is referred to a Hearing Committee, Special Hearing Officer or Board Panel for trial.

The Rules of the Board of Bar Overseers expand upon the requirements of Section 8(3) of Rule 4:01. Those Rules provide that, when the parties recommend, after the completion of an investigation, that the matter be resolved by agreed discipline, Bar Counsel shall prepare and file a Petition for Discipline. Rules of the Board of Bar Overseers, Chapter 2, Section 2.8(c). The matter is then referred to the Board and proceeds pursuant to Chapter Three, Sections 3.19 (d) and (e) of the Board Rules. For the most part, Chapter Three, Section 3.19 (d) repeats the text of Section 8(3) of Supreme Judicial Court Rule 4:01. Subparagraph (e) of Section 3.19 describes procedures that apply when the Board rejects the parties' joint recommendation. That Section also provides the parties with an opportunity to file briefs in support of their recommendation after receiving the Board's reasons for rejecting the proposed agreement, and sets forth procedures should the Board uphold its initial rejection of the proposed agreement.

The team was advised that in practice, not many cases are resolved by way of discipline on consent subsequent to the filing of formal charges. The team perceived that once formal charges are filed, there is reluctance by Bar Counsel's Office to negotiate an agreed disposition. As noted above, discipline based upon admitted misconduct should be encouraged at any stage of the proceedings. Discipline on consent, implemented expeditiously, benefits the public and the parties. The public is promptly protected from an unethical lawyer and the respondent avoids a time-consuming, costly and public trial. Disciplinary officials are not required to expend valuable time and resources on formal prosecutions and can devote their energies to contested matters.

Petitions for discipline on consent should still be filed directly with the Board. This would divest the Hearing Committees of jurisdiction in cases that have been assigned prior to an agreement being reached. *See,* Rule 21, *ABA Model Rules for Lawyer Disciplinary Enforcement.* In order to assist the Board in making a decision expeditiously, the petitions should be as complete as possible. Given that the team understands that Bar Counsel already uses fact and not notice pleading, preparing this petition should not take additional time. The section of the petition recommending the agreed upon public sanction should cite to case law and the *ABA Standards for Imposing Lawyer Sanctions*.

Bar Counsel should prepare the petition for joint submission with the respondent. The respondent should still be required to submit together with the petition an affidavit that states that he or she consents to the suggested discipline freely and voluntarily, that he or she is aware of the ramifications of submitting the petition, that the material facts alleged therein are true and that, if the matter proceeded to trial, he/she could not successfully defend against the allegations.

The Board should rule promptly. If it approves the petition for discipline on consent and the recommended sanction is suspension, probation or disbarment, the matter should be filed with the Court for prompt action. If the recommended sanction is a reprimand, the Board should enter the order. If the Board rejects the petition, it should provide a brief statement of the reasons why and then the matter should proceed for trial before a Hearing Committee. There is no need for a process by which the parties can appeal a rejection by the Board by filing briefs in support of the recommendation. The Board will have already been presented with a complete record. If formal charges had been pending before a Hearing Committee at the time the petition for discipline on consent was filed and subsequently rejected, the matter should be assigned to a new Hearing Committee. Any admissions by the respondent in the petition or affidavit should be considered withdrawn and cannot be used in any subsequent proceeding.

Recommendation 6: The Court Should Consider Amending Supreme Judicial Court Rule 4:01 to Create a Process By Which Petitions For Discipline On Matters Involving Lesser Misconduct Are Handled On An Expedited Basis

Commentary

To ensure that matters involving Petitions for Discipline are heard as expeditiously as possible, the Court should consider amending Supreme Judicial Court Rule 4:01 to adopt a process by which matters alleging lesser misconduct are handled on an expedited basis. The creation of such a mechanism would further enhance the prioritization of cases that will help eliminate the backlog and maintain currency in the docket.

Lesser misconduct is conduct that does not warrant a sanction that restricts the respondent's license to practice law. Rule 9(B) of the *ABA Model Rules for Lawyer Disciplinary Enforcement* provides that conduct should not be considered lesser misconduct if any of the following considerations apply:

(1) the misconduct involves the misappropriation of funds;
(2) the misconduct results in or is likely to result in substantial prejudice to a client or other person;
(3) the respondent has been publicly disciplined in the last three years;
(4) the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the last five years;
(5) the misconduct involves dishonesty, deceit, fraud, or misrepresentation by the respondent;
(6) the misconduct constitutes a "serious crime" as defined in Rule 19(C) of the *ABA Model Rules for Lawyer Disciplinary Enforcement*; or
(7) the misconduct is part of a pattern of similar misconduct.

In Massachusetts, lesser misconduct would include cases where formal charges are warranted and a sanction less than suspension, such as reprimand, costs, or restitution would be appropriate. The Court may also wish to consider whether to include probation (absent an attached stayed suspension) as a proper sanction for this type of misconduct.

If the charges set forth in the Petition for Discipline meet the definition of lesser misconduct, the team suggests that, instead of being heard by a Hearing Committee or Hearing Panel, the case be assigned to a Special Hearing Officer or a Hearing Committee Chair. Special Hearing Officers and Hearing Committee Chairs are lawyers. They could preside over the hearing and dismiss the matter, remand to a full Hearing Committee because the misconduct alleged is greater than that defined as "lesser misconduct" or submit their findings and a recommendation for a sanction not exceeding reprimand, the imposition of costs or

restitution. In these cases, pre-hearing conferences need not be held. If no pre-hearing conference is held, the hearing should be scheduled [thirty days] from the date the matter is assigned to the Special Hearing Officer or Hearing Committee Chair. The parties should be able to appeal the decision of the adjudicator to the Board, followed by a discretionary appeal to the Court.

The respondent's right to notice and hearing and to present evidence and to confront witnesses should be preserved. However, since these cases do not involve suspension or disbarment as potential sanctions, the expedited process described is commensurate with the rights and privileges under review. Where the alleged misconduct does not warrant a sanction that restricts the respondent's license to practice, there is no justification for employing the full panoply of formal procedures. Rule 18(H), *ABA Model Rules for Lawyer Disciplinary Enforcement.*

Recommendation 7: The Court Should Eliminate The Use Of Private Admonitions After The Filing Of A Petition For Discipline and Further Streamline the Rules Relating to Administration of Admonitions.

Commentary

Pursuant to various Sections of Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers, private admonitions may be imposed after the filing of a Petition for Discipline. This results in the anomaly of having to seal the record of proceedings that have already been made public following a recommendation for imposition of an admonition by a Hearing Committee, Special Hearing Officer, Hearing Panel, Appeal Panel, the Board or the Court. Supreme Judicial Court Rule 4:01, Section 20(3)(d); Rules of the Board of Bar Overseers, Chapter 3, Section 3.22 (b)(4). The rules relating to private admonitions, described in further detail below, also set forth detailed procedures for the imposition, appeal or rejection/vacation of this sanction at varying stages of the disciplinary process.

The consultation team recommends that the Court amend the relevant sections of Supreme Judicial Court Rule 4:01 and direct the Board to make conforming amendments to the Rules of the Board of Bar Overseers to eliminate the imposition of admonitions after disciplinary proceedings become public. The imposition of a private sanction after the commencement of public formal disciplinary proceedings adversely impacts the public's perception of the disciplinary process and fosters distrust of the system. The sealing of once public proceedings after a hearing on formal charges creates the misimpression that the system is protecting respondents as opposed to the public. The team also recommends that the Court and the Board enact rules that streamline the process by which this low level sanction is imposed, rejected, vacated or appealed. The current procedures are unnecessarily convoluted. *See*, Rule 10 (A)(5), *ABA Model Rules for Lawyer Disciplinary Enforcement*.

A. Current Procedures For Imposition of Admonitions Prior to Filing of Petition for Discipline

Sections 7(2)(b) and 8(1)(b)(ii) of Supreme Judicial Court Rule 4:01 state that Bar Counsel may dispose of a complaint by making a recommendation to the Board for the imposition of an admonition in cases where the complaint is minor in character. Chapter 2, Section 2.7(2)(B) of the Rules of the Board of Bar Overseers explains that Bar Counsel may recommend to the Board that an admonition be imposed "in those cases in which a violation of the Disciplinary Rules is found which is determined to be of insufficient gravity to warrant the prosecution of formal charges…." Section 2.8 (a)(1) of the Rules of the Board of Bar Overseers requires Bar Counsel to submit a charging memorandum to the Reviewing Board Member assigned to consider the recommendation for an admonition. The team was advised that these charging memos are detailed and thus take time to prepare. The Reviewing Board Member can consult with Bar Counsel in making his/her determination to approve, reject or

modify the recommendation for an admonition. Supreme Judicial Court Rule 4:01, Section 8(1)(b); Rules of the Board of Bar Overseers, Section 2.8(a)(2).

Bar Counsel may appeal to the Board Chair the Reviewing Board Member's decision to reject or modify a recommendation for disposition of a complaint after completion of an investigation. If Bar Counsel is not satisfied with the Board Chair's recommendation, a further appeal may be taken to the full Board. According to the Rules, at this point in the proceedings, the respondent is not permitted to appeal a decision by the Reviewing Board Member or Board Chair.

Supreme Judicial Court Rule 4:01, Section 8(2) states that if the admonition is approved by the Reviewing Board Member, Bar Counsel shall administer it. The respondent must appear in person to receive the admonition. Rules of the Board of Bar Overseers, Sections 2.10(2) and 2.11(a). The respondent is not entitled to appeal an admonition but has the right to demand that formal proceedings be instituted. The respondent's demand must be in writing either to reject the admonition via a form provided by Bar Counsel or to move to vacate it within thirty days after its administration. Supreme Judicial Court Rule 4:01, Section 8(2) and Rules of the Board of Bar Overseers, Sections 2.11(a) and (c) and 2.12. Vacation of the admonition is automatic upon the making of such a demand. At that point, a Petition for Discipline is filed.

B. Current Procedures for Imposition of Admonitions Subsequent to the Filing of a Petition for Discipline

After the filing of a Petition for Discipline, the case is assigned to a Hearing Committee, a Special Hearing Officer, a Hearing Panel of the Board or, at the discretion of the Chair of the Board, to the full Board. These entities act as the trier of fact. Supreme Judicial Court Rule 4:01, Sections 5(3)(e) and 6(3) and (4); Rules of the Board of Bar Overseers, Chapter 3, Section 3.19. At the conclusion of the public hearing, the trier of fact issues a report and recommendation for sanction. The recommended sanction may include an admonition. If the recommended sanction is an admonition, then future proceedings relating to that case are sealed and become confidential. Supreme Judicial Court Rule 4:01, Section 20 (3)(d); Rules of the Board of Bar Overseers, Chapter 3, Section 3.22 (b)(4).

Either the respondent or Bar Counsel may object to the findings and recommendation of the trier of fact. Supreme Judicial Court Rule 4:01, Section 8(4); Rules of the Board of Bar Overseers, Chapter 3, Section 3.50 et. seq. Briefs are then submitted to the Board. The Board hears the appeal as a whole or by assignment to an Appeal Panel. If the Board sustains the recommendation for an admonition, the respondent or Bar Counsel may object by demanding that the Board file an Information with the Court. Supreme Judicial Court Rule 4:01, Section 8(4); Rules of the Board of Bar Overseers, Chapter 3, Section 3.57. The Court may uphold the recommendation and order that an admonition be administered.

If the Board determines that an admonition is appropriate, it must serve a copy of its vote and memorandum of decision on the parties. The vote and memorandum constitute the

admonition. Rules of the Board of Bar Overseers, Chapter 3, Section 3.56 (a). If the Court orders an admonition, its opinion comprises the admonition. The Board and Bar Counsel are required to keep the fact of the receipt of the admonition confidential. However, in response to a specific inquiry about the outcome of a once public proceeding, the Board or Bar Counsel may disclose that an admonition was given. Rules of the Board of Bar Overseers, Chapter 3, Section 3.56 (c). Admonitions are automatically vacated after eight years. Supreme Judicial Court Rule 4:01, Section 8(2); Rules of the Board of Bar Overseers, Chapter 4, Section 4.3.

C. Eliminating Private Admonitions After Proceedings Become Public and Streamlining Admonition Procedures.

Private sanctions, like admonitions, should be reserved for instances of minor misconduct that do not warrant the filing of formal charges and where there is little or no harm to the client, the public or the legal profession. Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers already recognize this. Another factor to be considered in imposing a private sanction in these instances is whether there is little likelihood that the lawyer will repeat the misconduct. Any form of private discipline should be imposed prior to the filing of formal charges in a lawyer disciplinary proceeding.

Procedures for the imposition of admonitions should be simple and direct. Amendments to Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers should also eliminate the multiple appeals for this low level, private sanction, thereby streamlining the process and conserving resources.

The team recommends that the Court and Board amend their respective rules to provide that, if after an investigation Bar Counsel recommends and the Board approves the issuance of an admonition, the respondent should be notified of the proposed disposition and advised that he/she may demand, within fourteen days, that the matter be disposed of by formal charges instead. Failure of the respondent to make that demand within fourteen days constitutes consent to the admonition. Rule 11 (C)(1), *ABA Model Rules for Lawyer Disciplinary Enforcement.* It does not make sense to permit the respondent to move to vacate an admonition once he/she has consented to it and the sanction is administered. The team recommends that those sections of Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers that permit this be eliminated.

If the respondent consents to the admonition, it should be administered in writing and served upon the respondent. Rule 10(A)(5), *ABA Model Rules for Lawyer Disciplinary Enforcement*. The Court and Board should eliminate the requirement that the respondent appear in person to receive the admonition. Requiring the respondent to appear in person to receive this type of sanction is not an efficient use of Bar Counsel's resources. An admonition may be used in subsequent disciplinary proceedings where a respondent has been found guilty of misconduct as evidence of prior misconduct.

Recommendation 8: The Rules of the Board of Bar Overseers Should Be Amended To Change the Manner In Which Pre-Hearing Motions Are Ruled Upon, to Require Pre-Hearing Conferences And To Permit Encouragement of Settlement At Such Pre-Hearing Conferences

Commentary

Section 8(3) of Supreme Judicial Court Rule 4:01 and Section 3.19(b) of the Rules of the Board of Bar Overseers state that if there are any contested issues raised by a respondent's answer to a Petition for Discipline, or if the respondent wishes to be heard in mitigation, the case should be assigned to a Hearing Committee, a Hearing Panel of the Board, to the full Board, or to a Special Hearing Officer. Section 3.18 of the Rules of the Board of Bar Overseers provides that pre-hearing motions other than motions to dismiss are to be filed with the Board at least 14 days prior to hearing. These motions are to be served on the opposing party, who has seven days to file a response. Thereafter, the motion is submitted to a member of the Board who may rule on it or refer the motion for ruling to the Chair of the assigned Hearing Committee, Board Hearing Panel or Special Hearing Officer. A hearing on the motion may be held at the discretion of the individual assigned to rule on the motion. Rules of the Board of Bar Overseers, Chapter 3, Section 3.18(a).

Motions to dismiss a Petition for Discipline or any charges set forth in the Petition must be ruled upon by the Board Chair or his/her designee. Rules of the Board of Bar Overseers, Chapter 3, Section 3.18(b)(1). If such a motion is filed by Bar Counsel and is denied, either party may appeal to the full Board. If a respondent's motion to dismiss is allowed, Bar Counsel may appeal that decision to the full Board. Rules of the Board of Bar Overseers, Chapter 3, Section 3.18(b)(3) and (4).

The team recommends that Section 3.18 of the Rules of the Board of Bar Overseers be amended to provide that all pre-hearing motions, including motions to dismiss, should be decided by the Chair of the Hearing Committee, Hearing Panel or Special Hearing Officer assigned to the case. Rule 3(E)(3), *ABA Model Rules for Lawyer Disciplinary Enforcement*. The Chair of the Hearing Committee/Panel or Special Hearing Officer is already charged with resolving motions made during the course of the hearing (Section 3.32 of the Rules of The Board of Bar Overseers) and with addressing pre-trial procedural and substantive issues, including requests for discovery and other matters that aid in the prompt and orderly conduct of the proceedings. It makes better sense for this individual to rule on pre-trial motions, including those seeking dismissal. With a statewide panel of Hearing Committee members described in Recommendation One, instead of a Hearing Committee drawn from the respondent's home district, perceptions of protectionism relating to the Hearing Committee/Panel Chair's or Special Hearing Officer's rulings will be eliminated. Any permitted appeal could then be made to the Board Chair. Section 3.26 of the Rules of the Board of Bar Overseers already provides that the rulings made during the course of pre-

hearing conferences control the subsequent course of the hearing unless modified by the Board Chair for good cause shown.
The team also suggests that the possibility of hearings on any pre-trial motions be eliminated from the Rules. Motions and any responsive pleadings should contain sufficient facts, argument and citation to authority to permit a ruling to be made without oral argument.

The team is not certain why, in the absence of unusual circumstances, Bar Counsel's motion to dismiss a Petition for Discipline or any portion of the charges set forth in such a Petition would be denied and a hearing required. From a resource perspective, this is difficult to understand. Typically, motions to dismiss by Bar Counsel are made if there is a change in circumstances that means that he/she cannot prove the allegations by the required standard of proof. Unless circumstances demonstrate an abuse of authority by Bar Counsel, such motions should be granted without prejudice.

The Rules of the Board of Bar Overseers should also be amended to require at least one pre-hearing conference in each matter pending before the Hearing Committees/Panels or Special Hearing Officers. Currently, Section 3.23(a) of the Rules of the Board of Bar Overseers provides that these pre-hearing conferences may, with or without motion and after consideration of the possibility of beneficial results, schedule a pre-hearing conference. The team learned that these pre-hearing conferences are, in fact, utilized in virtually all instances. This is laudable, as are the Sections of the Rules of the Board of Bar Overseers that set forth the matters to be addressed during pre-hearing such as reaching stipulations as to facts and genuineness of documents. It is not clear if this is done via the filing of Requests to Admit Facts and Genuineness of Documents, or if the stipulations are obtained from the parties by the Chair in-person during the pre-hearing conference. The team suggests using the former as the initial method by which to obtain these agreements.

The purpose of the Rules of the Board of Bar Overseers relating to pre-hearing conferences is to streamline cases and avoid unnecessary delays. Making pre-hearing conferences mandatory will further those goals and will continue to result in the creation of case management plans early in the process that are tailored to the unique nature and complexity of each case. The Chair of the Hearing Committee/Panel or Special Hearing Officer should set strict time limits for conducting discovery and permit continuances only for good cause shown. The Chair should be permitted to impose sanctions, such as precluding the introduction of evidence or testimony, for discovery violations.

Hearing Committees/Panels and Special Hearing Officers should utilize every available tool to limit the issues at trial and to obtain stipulations. The Rules relating to pre-hearing conferences should permit the Hearing Committee/Panel Chair or Special Hearing Officer to encourage the parties to reach agreed resolutions of cases via discipline on consent. Judges frequently engage in similar actions in civil cases. Any perceptions of inappropriate interference by adjudicators in the negotiating process can be addressed by limiting their role to exploring the possibility of an agreed resolution in appropriate instances. Of course the parties, as noted in Recommendation Five, should reach agreements in appropriate cases without motivation by the Hearing Committee/Panel Chair or Special Hearing Officer.

Requiring volunteers to devote their time to matters that are best resolved by agreement does not serve the public or the system and wastes resources.

Some have suggested adding another layer to the discipline system by creating a process by which Petitions for Discipline, once filed, are submitted for mediation to a neutral third party. To do so would add time to the processing of cases when there is already a viable mechanism in place and too much delay in the system.

Recommendation 9: Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers Should Be Amended to Liberalize Discovery

Commentary

There is limited discovery in Massachusetts' lawyer disciplinary proceedings. Within thirty days after a respondent's answer to a Petition for Discipline is filed, or earlier if the respondent requests, Bar Counsel must provide copies of any recorded statements taken of the respondent. Rules of the Board of Bar Overseers, Section 3.17 (a). Further, upon motion, the parties may be ordered to exchange copies of any recorded statements or testimony of a person whom the party intends to call as a witness. A recorded statement is any statement that has been stenographically or electronically recorded, or which has been given in the form of an affidavit. Rules of the Board of Bar Overseers, Section 3.17 (b). Finally, if the respondent requests, Bar Counsel is required to allow the respondent to inspect and copy any documents, books, records, correspondence or other material that has been provided to Bar Counsel in response to an investigatory subpoena pursuant to Section 4.4 of the Board Rules. Rules of the Board of Bar Overseers, Section 3.17 (c). Neither Bar Counsel nor respondent's counsel is required to disclose materials subject to the work-product privilege. Rules of the Board of Bar Overseers, Section 3.17 (d).

Further documentary discovery also can occur as a result of pre-hearing conferences. During the course of those conferences, the parties are ordered to exchange the names and addresses of lay and expert witnesses and exhibits that they intend to introduce at hearing on the merits of the allegations in the Petition for Discipline. If a party intends to call an expert witness, there must be written disclosure of the expert's qualifications, the subject matter upon which the expert is expected to testify and the substance of the expert's opinions and the facts upon which the opinions are based. Rules of the Board of Bar Overseers, Section 3.24 (2).

Respondents are not permitted to take discovery depositions. This prohibition appears to include the taking of depositions of expert witnesses to be called by Bar Counsel's Office. Pursuant to Section 4.9 of the Rules of the Board of Bar Overseers, evidence depositions and depositions to preserve testimony of witnesses are permitted with the permission of the Hearing Committee/Panel/Special Hearing Officer or the Chair of the Board. The team is also aware that the judicial discipline process in Massachusetts permits judges who are the subject of charges of misconduct to take discovery depositions of witnesses.

The team recommends that the Court direct the Board to amend the Rules of the Board of Bar Overseers and to adopt a corresponding rule as part of Supreme Judicial Court Rule 4:01 to provide for more liberal discovery in Massachusetts lawyer disciplinary proceedings. The team believes that if non-privileged information is relevant for discovery purposes according to applicable law in Massachusetts, it should be disclosed so that the respondent can adequately prepare his/her case. The discovery rules applicable to lawyer disciplinary proceedings should require Bar Counsel, after the initiation of formal proceedings, to provide respondents and respondents' counsel with a copy of the unprivileged contents of the file.

Rule 15, *ABA Model Rules for Lawyer Disciplinary Enforcement*. Liberal exchanges of non-privileged information facilitate the efficient and fair movement of cases through the system.

The Court should also consider requiring Bar Counsel's Office to create and provide to the respondent/respondents' counsel a privilege log so that any appropriate challenges to the withholding of materials can be made. In response to such a challenge, an *in camera* inspection of the documents can be made by the Hearing Committee/Panel Chair or Special Hearing Officer, and a ruling on the challenge made. Such rulings should be considered interlocutory and should not be appealable prior to the entry of a final order by the trier of fact. The creation of a privilege log should not require much effort if Bar Counsel commences such a practice when the file is opened. The rules should also require Bar Counsel to disclose all exculpatory information to the respondent/respondents' counsel.

The team recommends that the discovery rules be expanded to permit appropriate deposition practice. The Court should consider applying the Massachusetts Rules of Civil Procedure to depositions in lawyer disciplinary proceedings. Concerns about potential abuses of witnesses during depositions could be addressed by oversight and appropriate limitations imposed by the Hearing Committee/Panel Chair or Special Hearing Officer. Parties who abuse discovery via deposition should be subject to sanctions that include preclusion of the presentation of evidence or testimony. The Court can tailor these new discovery rules accordingly. Protective orders, if necessary, could also be ordered.

Specific concerns were expressed to the team that permitting deposition practice would require complainants to hire counsel to protect their interests. While any witness may choose to have counsel defend a deposition, the presence of Bar Counsel and the availability of a Hearing Committee Chair are sufficient protection in the many states that permit this practice. Again, where abuses occur, nothing would prevent Bar Counsel from terminating the deposition pending a ruling by the Hearing Committee/Panel Chair or Special Hearing Officer.

After formal charges are filed, Bar Counsel and the respondent should be able to compel the attendance of witnesses and the production of materials at a deposition. Rule 14, *ABA Model Rules for Lawyer Disciplinary Enforcement*. For example, there are cases where the determination as to whether a rule violation occurred will depend solely upon the word of a witness, including the complainant, versus the word of the respondent. A rule that sets forth a strictly enforced time period within which depositions must be taken will avoid delay in the proceedings. The Chair of the Hearing Committee or Special Hearing Officer may extend the time period only for good cause shown.

Recommendation 10: Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers Should Be Amended to Streamline Appeals At Various Levels of the Disciplinary Process

Commentary

The team strongly believes that providing due process through appellate mechanisms is important. However, the system must not only be fair, it must be able to operate efficiently. Thus, the team recommends that the Rules of the Board of Bar Overseers and Supreme Judicial Court Rule 4:01 be amended to streamline the system's appellate processes to eliminate duplication, enhance the efficiency of the Board and avoid unnecessary burdens on the Court.

A. Appeals Relating to Recommendations to Prosecute Formal Charges

If at the completion of an investigation, Bar Counsel believes that formal charges should be filed and there is no agreement with the respondent to proceed with discipline by agreement, a request to file formal charges is made to a Reviewing Member of the Board. The recommendation is accompanied by a draft of the Petition for Discipline and a Charging Memorandum. Rules of the Board of Bar Overseers, Section 2.8 (b). If the Reviewing Member of the Board rejects or modifies Bar Counsel's recommendation, he/she must set forth the reasons for the rejection or modification on the appropriate recommendation forms.

Bar Counsel may appeal that decision to the Chair of the Board. Rules of the Board of Bar Overseers, Section 2.9 (a). If the Chair of the Board sustains the recommendation of the Reviewing Member, Bar Counsel may then appeal to the full Board. Rules of the Board of Bar Overseers, Section 2.9 (b) and (c). As the team reads Section 2.9 (e) of the Rules of the Board of Bar Overseers, if the full Board decides to sustain the Board Chair's ruling rejecting Bar Counsel's request to file formal charges and dismisses the matter, Bar Counsel may object and the Board must then file an Information with the Court.

The team recommends that the Court direct the Board to amend Section 2.9 of the Rules of the Board of Bar Overseers to eliminate any appeals by Bar Counsel after those made to the Board Chair. Given the thoroughness of Bar Counsel's investigations and the detail contained in the Petition for Discipline and Charging Memo, two appeals by Bar Counsel of a rejected recommendation to file formal charges are sufficient. Further appeals would constitute an inefficient use of Bar Counsel's, the Board's and possibly even the Court's resources. The decision of the Board Chair should be final.

B. Appeals to the Board From the Decisions of the Hearing Committees, Hearing Panels or Special Hearing Officers

Pursuant to Supreme Judicial Court Rule 4:01, Section 8(4), if Bar Counsel or the respondent object to the report and recommendation of a Hearing Committee, Hearing Panel or Special Hearing Officer, the Board must set dates for the submission of briefs. The Board may also schedule any further hearing that it deems necessary.

The team recommends that the Court eliminate the portion of Section 8(4) of Supreme Judicial Court Rule 4:01 that gives the Board the discretion to order any additional hearings that it deems necessary. Further, the parts of Section 3.50 (e), (f) and (g) of the Rules of the Board of Bar Overseers, which provide for a similar remand by an Appeal Panel or the Board, should be eliminated. The team was advised that this practice is used infrequently. The parties should be required to introduce all evidence at the hearing before the Hearing Committee, Hearing Panel or Special Hearing Officer. Matters should not be remanded for further evidentiary proceedings because the Board desires additional information. This results in additional delay. The Board's review should be limited to the record created below. Only if new evidence warranting the reopening of a proceeding, such as exculpatory evidence, is discovered should there be a remand. Section 3.59 of the Rules of the Board of Bar Overseers already seems to address the issue of new evidence warranting the reopening of a proceeding.

A party objecting to the report and recommendation of a Hearing Committee or Special Hearing Officer must, within twenty days after service of that report, file a brief on appeal. A responsive brief, which may raise any cross-appeal, is due twenty days thereafter. Rules of the Board of Bar Overseers, Section 3.50 (a). The appellant may respond to any cross-appeal. The Board may extend the time for the filing of briefs. Oral argument is waived unless requested in a brief.

The Board, itself, may hear an appeal from the report and recommendation of a Hearing Committee, Hearing Panel or Special Hearing Officer, or it may refer the matter to an Appeal Panel of the Board. Rules of the Board of Bar Overseers, Section 3.50 (e). The Appeal Panel must report its findings and recommendations to the Board. The Board then serves that report on Bar Counsel and the respondent. Either party may appeal the report and recommendation of the Appeal Panel to the full Board by filing an objection. Opposition to such objections may also be filed.

The full Board then reviews the matter on the entire record, including the briefs submitted, as part of the original appeal that was referred to the Appeal Panel. Rules of the Board of Bar Overseers, Section 3.50 (f). Members of the Appeal Panel do not have to recuse themselves from full Board consideration. However, if the original hearing was held before a Hearing Panel of the Board, the members of that Hearing Panel must recuse themselves from the appeal.

Pursuant to Section 3.52 of the Rules of the Board of Bar Overseers, the Board must undertake a review of a case even if neither party appeals the report and recommendation of

the trier of fact. If it makes an initial determination that the decision of the Hearing Committee, Hearing Panel or Special Hearing Officer should not be affirmed, the Board notifies the parties and the matter proceeds as if an appeal had been taken.

The team recommends that the Court direct the Board of Bar Overseers to eliminate Section 3.52. The Board should only review a Hearing Committee, Hearing Panel or Special Hearing Officer report and recommendation if objections are timely filed, or if a majority of the Board votes to review the matter because it presents a novel or significant issue of law. Assuming that a Hearing Committee, Hearing Panel or Special Hearing Officer files a complete report and recommendation, that neither party objects, and the recommended sanction is suspension, probation with a stayed suspension or disbarment, the matter should proceed directly to the Court with a statement that the parties have not objected and the Board has declined to review the matter. If the recommended sanction is a reprimand, the Board should impose the reprimand. Rule 11(E), *ABA Model Rules for Lawyer Disciplinary Enforcement*.

The team agrees that the availability of an appeal in the disciplinary process is important. However, there should only be one level of Board appeal before a matter proceeds to the Court. The Court, in consultation with the Oversight Committee of the Board and the General Counsel of the Board, may determine which level of appeal is best—consideration of all appeals by the full Board, or having cases on appeal assigned to Appellate Panels of the Board. Either way, recusal of members of Hearing Panels of the Board that acted as the trier of fact for a case should continue. The appellate tribunal at the Board level should limit its review to a consideration of the record below and should give the factual findings of the trier of fact appropriate deference. The Rules of the Board of Bar Overseers already recognize that the Hearing Committees, Hearing Panels and Special Hearing Officers are the sole judges of the credibility of the testimony presented at hearing. With respect to conclusions of law and recommendations for discipline, the Board level appellate tribunal should uphold them unless the trier of fact has acted arbitrarily, committed reversible error, incorrectly stated the law or abused their discretion.

C. Appeals to the Supreme Judicial Court

When the Board, in its appellate capacity determines that a matter should be resolved by suspension or disbarment, when Bar Counsel objects to an order of dismissal, or when Bar Counsel or the respondent objects to having the matter concluded by a public reprimand or admonition, the Board must file an Information with the Court. Supreme Judicial Court Rule 4:01, Section 8 (4); Rules of the Board of Bar Overseers, Section 3.57. The Board files the Information and the entire record of the proceedings below with the Clerk of the Court. Rules of the Board of Bar Overseers, Section 3.58.

A single justice of the Supreme Judicial Court hears the matter and issues an order. The team was advised that there is some delay at the single justice level of the proceedings. Either party may appeal that order to the full Court. The full Court then hears the matter and issues an opinion.

The team recommends that the Court amend Supreme Judicial Court Rule 4:01 and adopt a rule that provides for one level of discretionary appeal from the Board to the Court. The team recommends eliminating the mandatory review of the matters described above by a single justice of the Court. Instead, if a party objects to the Board's findings and recommendation, he/she may file a request for consideration of the matter by the Court. The Court may, in its discretion, decide to review the matter or it may deny the appeal. If the Court does not review the matter, and the sanction recommended by the Board is suspension, disbarment or probation with a stayed suspension as suggested in Recommendation Fifteen below, the Court should impose the recommended sanction. If the recommended sanction is a reprimand, the Board should impose the reprimand. Rule 11(F), *ABA Model Rules for Lawyer Disciplinary Enforcement*. The Court should set forth in this new rule specific requirements for the filing objections and requests for review and for the filing of briefs and any requests for oral argument.

The Court should be able to rely on the adjudicators below to dispose of matters in accordance with established disciplinary law. Review by the Court should occur only in cases involving significant, novel or new issues of law. This will speed up the process and reduce the burden on the Court. As with the Board, deference should be given to the findings of fact made by the Hearing Committees, Hearing Panels and the Special Hearings Officers. The team was advised that such is the current practice by the Court.

Recommendation 11: The Rules Relating To Reinstatement Proceedings Should Be Amended to Ensure Decisions Are Prompt And To Protect Sensitive Information Contained in the Questionnaire From Public Disclosure

Commentary

The team was advised that the process relating to Petitions for Reinstatement suffers from some delay. Taking into account that each case varies in terms of complexity and time needed to conduct a thorough review of a Petition, Reinstatement Docket statistics provided to the team from the Clerk of the Supreme Judicial Court evidence some reason for concern with respect to the timeliness in which Petitions are processed.

For example, in Fiscal-Year 2003 (from October 1, 2002 through September 30, 2003), in a case involving an indefinite suspension, the Petition for Reinstatement was filed on August 28, 2001 and transmitted to the Board on September 19, 2001. The Court received the Board's vote on the Petition 524 days later, on February 25, 2003. In another case, where a lawyer resigned in lieu of disbarment, the Petition for Reinstatement was filed on July 25, 2001. The Clerk transmitted that Petition to the Board on August 1, 2001. The Court received the Board's vote on August 19, 2003 (748 days later).

The Reinstatement Docket for Fiscal-Year 2004 (October 1, 2003 through September 30, 2004) indicates similar problems. In one case a lawyer who had been suspended indefinitely filed a Petition for Reinstatement on April 4, 2002. The Clerk transmitted the Petition to the Board on the same day. As of June 30, 2005, that matter was still pending before the Board—a total of over 1177 days. In another case, a lawyer who had been suspended for one year and a day filed his/her Petition on September 16, 2003 and the Clerk transmitted the matter to the Board on September 19, 2003. The Board sent its recommendation to the Court on August 25, 2004, 340 days later.

The team recognizes that reinstatement cases are often the most labor-intensive matters investigated and tried by Bar Counsel's office. The team understands that the more time that has passed between the time of discipline and the filing of the Petition, the greater the amount of information that needs to be examined. This is true nationwide. It is unclear to the team whether the bulk of the delay occurs during the time that Bar Counsel is investigating the Petition or whether the delay is at the Hearing Committee/Board level. Regardless of where it occurs, unreasonable delay may result in the prolonging of a period of discipline. This is particularly true where the Petitioner has finished serving a fixed period of suspension. The need to take appropriate time and to be careful while investigating the fitness for reinstatement/readmission of a disciplined lawyer is important for the protection of the public. However, care must also be taken to ensure requisite fairness to the Petitioner. Therefore, the team offers several suggestions for amending Section 18 of Supreme Judicial Court Rule 4:01 to increase the timeliness in the processing of Petitions for Reinstatement.

A. Expediting the Reinstatement Process Reinstatements

As noted above, reinstatement cases are often labor intensive and time consuming. This is especially true when the petitioner has been suspended for a period of time in excess of a year or disbarred.

Lawyers in Massachusetts who have been suspended for six months or less are reinstated automatically ten days after filing the requisite affidavit. Lawyers suspended for more than six months but not more than one year must also take the Multistate Professional Responsibility Examination. Supreme Judicial Court Rule 4:01, Sections 18 (1) (a) and (b). Pursuant to Section 18 (1)(d) of Supreme Judicial Court Rule 4:01, the right to automatic reinstatement expires if the lawyer does not file the required affidavit within three months after the original term of suspension has expired. In that case, the lawyer must file a petition for reinstatement. The team is not certain of the rationale for this requirement and suggests that the Court may wish to consider repealing it.

Lawyers who have been suspended for more than one year or who have been disbarred, indefinitely suspended, suspended in excess of one year or who have resigned must petition for reinstatement. Lawyers who have resigned and disbarred lawyers may not petition for reinstatement until the expiration of at least eight years from the date of disbarment. Lawyers subject to indefinite suspensions may not file a petition until the expiration of five years from the effective date of the suspension order. Lawyers suspended for a specified term exceeding one year may not file a petition for reinstatement until the expiration of the specified period of suspension.

The Court should consider amending Section 18 of Supreme Judicial Court Rule 4:01 to provide that a disciplined lawyer may provide Bar Counsel with a copy of the completed Questionnaire and of the Petition he/she proposes to file with the Clerk of the Court within 120 days prior to the date on which the Petition may be filed. This would allow Bar Counsel's Office to start its investigation earlier and hopefully would serve to decrease delays after the Petition is actually filed.

The Court should also direct the Board to amend Section 3.67 of the Rules of the Board of Bar Overseers to require the Board to file public notice of the Petition and to indicate where to inquire about a hearing date <u>at the time</u> the Petition is filed. Currently Section 3.67 of the Rules of the Board of Bar Overseers requires such notice at least two weeks prior to the hearing. Amending the Rule as suggested would provide members of the public with knowledge relevant to the Petition more time to provide information that either supports or objects to the Petition to Bar Counsel. Also, the complainants in the underlying case that led to the discipline should be notified of the Petition and provided an opportunity to raise objections with Bar Counsel or support it. Rule 25(D), *ABA Model Rules for Lawyer Disciplinary Enforcement.*

Section 18(5) of Supreme Judicial Court Rule 4:01 requires the Clerk to transmit the Petition for Reinstatement to the Board within three days of its filing. Hearings on Petitions for

Reinstatement proceed in the same manner as hearings on formal disciplinary charges, except that the burden of proof is on the Petitioner. The hearings are public.

Section 18(5) of Supreme Judicial Court Rule 4:01 provides that hearings on Petitions for Reinstatement are to be held promptly. The report and recommendation of the Hearing Committee, Special Hearing Officer or Board Panel is submitted to the Board along with the record of proceedings. The Board then files its recommendation and findings with the Court.

The Court should also consider amending Section 18 of Rule 4:01 to provide that within [ninety] days after its receipt of the Petition, the Office of Bar Counsel must advise the Petitioner and the Board whether it objects or stipulates to the reinstatement of the Petitioner. Section 18 (7) already sets forth procedures for when Bar Counsel and the Board agree to waive a hearing on the Petition and have the Court grant it. If Bar Counsel's Office objects, it should set forth the specific basis of the objections and request a hearing. The Board should schedule the hearing to occur within ninety days of Bar Counsel's request. Rule 25 (F) and (G), *ABA Model Rules for Lawyer Disciplinary Enforcement*. The Court might also consider requiring the Board to submit its recommendation to the Court within a specified period of time after the hearing unless good cause is shown.

The Court should reserve the right to impose conditions on a lawyer's reinstatement. This should be done where the lawyer has met the burden of proof, but the Court feels that protection of the public requires further precautions. Conditions should be reasonably related to the lawyer's original suspension or disbarment or to the lawyer's failure to meet the criteria for reinstatement. They may include limitations on practice, participation in continuing legal education courses, monitoring of the lawyer's practice and/or accounts, abstention from drugs or alcohol and active participation in any accredited alcohol or drug rehabilitation program.

B. Protecting Sensitive Information From Public Disclosure

In Massachusetts, a disciplined lawyer who petitions for reinstatement must complete the Reinstatement Questionnaire found in the Rules of the Board of Bar Overseers, and submit four copies of it along with the Petition and a $500 cost deposit to the Board at the same time that the Petition is filed with the Clerk of the Court.

The Questionnaire requires the petitioner to provide a wide range of information that assists Bar Counsel in determining whether to object to the Petition. The utilization of this Questionnaire at the front end of the process is laudable. It should result in saving time that would otherwise be spent gathering this information during Bar Counsel's investigation of a Petition for Reinstatement.

However, according to Section 3.63 of the Rules of the Board of Bar Overseers, the Questionnaire becomes part of the public record of the reinstatement proceeding. Further, despite the fact that Section 18 of Supreme Judicial Court Rule 4:01 does not require that the Questionnaire be filed with the Court, the team was advised that recently many Petitioners

have done so. Section 18 only requires that the Petition filed with the Court state that the Questionnaire and Petition have been filed with the Board and served on Bar Counsel. The team was also advised that even when the Petitioner does not file the Questionnaire with the Court, Bar Counsel eventually does so.

The Questionnaire requests a large amount of sensitive personal information from the Petitioner. For example, the Petitioner is required to provide his/her social security number, tax returns, and detailed information about assets including bank account numbers, documents relating to real estate ownership and debts. The team believes that the Reinstatement Questionnaire should not be included as part of the public record of the reinstatement proceeding. There is no reason to make this information public. The Court should direct the Board to amend the Rules of the Board of Bar Overseers to make this clear. The Questionnaire should be submitted only to Bar Counsel's Office to assist in its investigation and should be held confidential. If Bar Counsel discovers during the investigation that the Petitioner has misrepresented information on the Questionnaire, the Questionnaire can be used during any hearing on the Petition for purposes of impeachment or to demonstrate that the Petitioner is unfit to regain his/her law license. Necessary protective orders pursuant to Section 20 of Supreme Judicial Court Rule 4:01 can be sought at that time if the portion of the Questionnaire used for impeachment or for admission into evidence contains sensitive information.

Recommendation 12: The Court Should Consider Amending Supreme Judicial Court Rule 4:01 Section 18(3) To Eliminate the Ability of Disbarred Or Suspended Lawyers to Request Court Permission to Work As a Paralegal

Commentary

Allowing a disbarred or suspended lawyer to be employed in a law office in any capacity is not protective of existing clients and the public and defeats the purpose of discipline. *See*, Rule 27(G), *ABA Model Rules for Lawyer Disciplinary Enforcement*. The lack of safeguards in Section 18(3) of Supreme Judicial Court Rule 4:01, as described below, increases the risk of harm to clients and the public. The team has been advised in other jurisdictions that permit such a practice of instances where the disbarred or suspended lawyer committed additional serious misconduct, thereby causing harm to clients and to the lawyer/law firm that hired that individual. The team believes that the risks posed by permitting a disbarred or suspended lawyer to be employed as a paralegal far outweigh any benefit of permitting this practice. There are other equally effective ways in which a disbarred or suspended lawyer can seek to demonstrate that he or she has maintained the necessary level of currency and competency in the law to warrant reinstatement that do not pose a risk to clients. As a result, the team recommends that the Court consider repealing Section 18 (3) of Supreme Judicial Court Rule 4:01.

Section 17 of Supreme Judicial Court Rule 4:01 currently sets forth the specific actions and duties of a lawyer who has resigned while under disciplinary investigation, been disbarred, suspended, temporarily suspended or placed on disability inactive status. The detail set forth in this Section of Supreme Judicial Court Rule is laudable as it provides these lawyers with very specific information about their obligations during the period of discipline and the consequences of not complying with these requirements.

Section 17(7) of the Rule provides that a lawyer who has resigned or who is disbarred, suspended or on disability inactive status cannot engage in paralegal work unless the Court has granted permission to do so pursuant to Section 18 (5) of that Rule. The reference to Section 18(5) appears to be a typographical error. Subparagraph (3) of Section 18 is entitled "Employment as paralegal" and subparagraph (5) relates to reinstatement procedures.

Arguably, the provisions of Section 17(8) of Supreme Judicial Court Rule 4:01, which increase the time period within which a disciplined lawyer can seek reinstatement, would apply if the Court finds that a disciplined lawyer has engaged in improper "legal work" prior to reinstatement. The team assumes improper "legal work" means engaging in the unauthorized practice of law. The Rule does not, however, define appropriate paralegal work for a disbarred or suspended lawyer versus what might be considered inappropriate "legal work." There also does not appear to be any mechanism in place for revocation of the privilege of being allowed employment as a paralegal prior to reinstatement. Presumably, the Court may place requirements for the monitoring and revocation of this privilege in its order, but the team does not know if this happens.

Pursuant to Section 18 (3), a disbarred or suspended lawyer may move for leave to engage in paralegal work at any time after expiration of the specified term of suspension, after the expiration of seven years in cases of disbarment and resignation, and four years following the imposition of an indefinite suspension. Recommendation Five urges the Court to eliminate resignations with charges pending. A disbarred lawyer may not apply for reinstatement until the lapse of eight years from the effective date of the sanction order; a lawyer suspended for an indefinite period of time must wait five years to petition for reinstatement. The Court may grant the motion to work as a paralegal subject to any conditions it deems necessary and appropriate to protect the public and the profession. It is worth noting that Section 18(3) does not apply to lawyers placed on disability inactive status, nor does the team believe that it should if the Court determines to allow this practice to continue.

Section 18(3) of Supreme Judicial Court Rule 4:01 does not set forth requirements for the monitoring of such paralegal work to ensure that the disbarred or suspended lawyer does not engage in the unauthorized practice of law. Nor does it provide a means by which to ensure that the licensed lawyer or law firm that employs such an individual is not aiding in the unauthorized practice of law. The Rules do not appear to set forth procedures for reporting violations to the Office of Bar Counsel.

V. ALTERNATIVES TO DISCIPLINE PROGRAM

Recommendation 13: The Supreme Judicial Court Should Adopt a Rule Creating An Alternatives to Discipline Program

Commentary

Nationwide, the majority of complaints made against lawyers allege instances of lesser misconduct. This is true in Massachusetts. Single instances of minor neglect or minor incompetence, while technically violations of the rules of professional conduct, are seldom treated as such. These cases rarely justify the resources needed to conduct formal disciplinary proceedings, nor do they justify the imposition of a disciplinary sanction. These complaints are almost always dismissed by the disciplinary agency. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with disciplinary systems. While these matters should be removed from the disciplinary system, they should not be simply dismissed. These complaints should be handled administratively via referral from discipline to programs such as fee arbitration, mediation, law practice management assistance, or any other program authorized by the Court. Rule 11(G), *ABA Model Rules for Lawyer Disciplinary Enforcement*.

According to the article written by Anne Kaufman, Assistant Bar Counsel and Director of the Attorney and Consumer Assistance Program entitled "Five Years of A.C.A.P.," the nature of problems that result in complainants contacting the Bar Counsel's Office has been consistent. According to that article, complaints about lack of diligence, failure to return telephone calls or competence-related complaints comprise approximately 24-27 percent of contacts with the Office. As noted above, fee issues comprise another 10 percent.

The team was advised that the current mechanism for handling matters involving lesser misconduct is the initiation of a "C" file, followed by dismissal of that complaint with conditions imposed by the Reviewing Board Member. This would appear to fall under Section 2.7 (2)(E) of the Rules of the Board of Bar Overseers, which provides that Bar Counsel may recommend that a "C" file be closed after adjustment, informal conference or reference to a bar association for mediation. Alternatively, these matters have been resolved by imposition of an admonition with conditions. It is not clear to the team what happens if the respondent whose file is dismissed does not comply with the conditions set forth in the dismissal letter.

The team recommends that the Court amend Supreme Judicial Court Rule 4:01 to provide for the creation of an alternatives to discipline program. Corresponding amendments should be made to the Rules of the Board of Bar Overseers. Based on the team's interviews, it appears there is a need for such a program in Massachusetts. The volunteer and professional leadership of the Massachusetts State Bar Association and the staff of the Lawyers Concerned For Lawyers Program have expressed a desire to work with the disciplinary agency to ensure

that Massachusetts lawyers are provided with necessary assistance when formal disciplinary proceedings are not warranted but some problem exists. The Office of Bar Counsel was recently provided with a link to the ABA's guide to setting up a bar-sponsored practice management program.

Currently, the Massachusetts Bar Association does not have a law practice management program. It does have a committee devoted to issues of small firms and solo practitioners. The team was advised that these types of practitioners comprise the majority of Massachusetts Bar Association members. Information provided to the team also indicated that the Massachusetts Bar Association planned to hire a full-time law practice management advisor in the near future. Expanding member benefits to encompass law office practice management would be an excellent step by the Massachusetts Bar Association to assist lawyers and ultimately the public. The team was advised that the Lawyers Concerned for Lawyers Program is also willing and able to handle matters that require law practice management assistance.

Referral to an alternatives to discipline program is not a form of disciplinary sanction and should be reserved for instances of minor misconduct that do not warrant formal proceedings, have caused little or no harm to clients or the public, and are not likely to be repeated. Rule 11(G), *ABA Model Rules for Lawyer Disciplinary Enforcement*. The Office of Bar Counsel, either through its Assistant Bar Counsel responsible for the investigation and prosecution of complaints or the staff of the Attorney and Consumer Assistance Program (A.C.A.P. Program) could refer a lawyer to the alternatives to discipline mechanism. The lawyers and paralegal/investigators who work for the A.C.A.P. Program are in a particularly good position to recognize when a respondent is in need of the type of intervention that an alternatives to discipline program provides.

The creation of the program will require cooperation between the organized bar and Bar Counsel's office in order to be successful. Under the scenario presented in this recommendation, Bar Counsel's Office, the Massachusetts Bar Association and the Lawyers Concerned For Lawyers Program will each have distinct and important roles to play in successfully implementing this initiative. That the Massachusetts Bar Association is a voluntary bar does not matter for purposes of implementing the alternatives to discipline program described below. The Court will also have to ensure that the program has adequate resources. The ABA Joint Committee on Lawyer Regulation is available to assist the Court, the State Bar, and Bar Counsel's Office in creating and implementing an alternatives to discipline program. The Joint Committee maintains resources including information about other state alternatives to discipline programs and has a liaison member from the ABA Section of Law Practice Management.

As noted above, participation in the program should not be used as an alternative to discipline in cases of serious misconduct or in cases that factually present little hope that participation will achieve program goals. In addition, the program should only be considered in cases where, assuming all the allegations against the lawyer are true, the presumptive sanction would be less than disbarment, suspension or probation. The existence of one or more

aggravating factors does not necessarily preclude participation in the program. For example, a pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying issue.

The existence of prior disciplinary offenses should not necessarily make a lawyer ineligible for referral to the alternatives to discipline program. Consideration should be given to whether the lawyer's prior offenses are of the same or similar nature, whether the lawyer has previously been placed in the alternatives to discipline program for similar conduct and whether it is reasonably foreseeable that the lawyer's participation in the program will be successful. Both mitigating and aggravating factors should be considered. The presence of one or more mitigating factors may qualify an otherwise ineligible lawyer for the program.

The Court should consider adopting a rule with the following components:

a. In matters involving lesser misconduct, prior to the filing of formal charges, Bar Counsel's Office may refer the lawyer to the Alternatives to Discipline Program. Lesser misconduct is conduct that does not warrant a sanction restricting the lawyer's license to practice law. Acts involving the misappropriation of funds, conduct causing, or likely to cause, substantial prejudice to clients or others, criminal conduct and conduct involving dishonesty, fraud, deceit or misrepresentation are not minor misconduct.

b. The complainant, if any, should be notified of the referral and should have a reasonable opportunity to submit new information about the respondent. This information should be made part of the record.

c. Bar Counsel should consider the following factors in deciding whether to refer a lawyer to the program:

(1) whether the presumptive sanction under the ABA Standards for Imposing Lawyer Sanctions for the alleged misconduct is likely to be no more severe than reprimand or censure;

(2) whether participation in the program will likely benefit the lawyer and accomplish the program's goals;

(3) whether aggravating and mitigating factors exist; and

(4) whether diversion has already been tried.

d. Bar Counsel and the respondent should negotiate a contract, the terms of which should be tailored to the unique circumstances of each case. The agreement should be signed by Bar Counsel and the lawyer, should set forth with specificity the terms and conditions of the plan and should provide for oversight of fulfillment of the agreement, including the reporting of any alleged breach to Bar Counsel. Oversight,

for example, would require the practice management monitor provided by the Massachusetts Bar Association or Lawyers Concerned for Lawyers Program to agree to report violations of the terms of the agreement to Bar Counsel. A practice and/or recovery monitor should be identified where necessary, and their duties set forth in the contract. If a recovery monitor is assigned, the contract should include the lawyer's waiver of confidentiality so that necessary disclosures may be made to Bar Counsel. The contract should include a specific acknowledgment that a material violation of a term of the contract renders voidable the lawyer's participation in the program for the original charge(s) filed. The contract should be amendable upon agreement of the lawyer and Bar Counsel. The agreement should also provide that the respondent pay all costs incurred in connection with the contract.

e. The lawyer should have the right not to participate in the program. If he or she chooses not to participate, the matter should proceed as if no referral had been made.

f. After an agreement is reached, the disciplinary complaint should be dismissed pending successful completion of the terms of the contract. As noted above, staff of the Massachusetts State Bar Association program or committee to which the lawyer was assigned, or the staff of the Lawyers Concerned For Lawyers Program should provide verification of successful completion of the program.

g. The contract should be terminated automatically upon successful completion of its terms. This constitutes a bar to further disciplinary proceedings based upon the same allegations.

h. A material breach of the contract terminates the lawyer's participation in the program and disciplinary proceedings may be resumed or reinstituted.

Because referral to the alternatives to discipline program occurs at the investigative stage of disciplinary proceedings, the Court should consider whether to amend Supreme Judicial Court Rule 4:01 to provide that files maintained by the Massachusetts State Bar Association or the Lawyers Concerned for Lawyers Program are confidential, with exceptions for the provision of those files to Bar Counsel pursuant to the contract signed by the respondent.

VI. SANCTIONS

Recommendation 14: The Court Should Consider Eliminating Indefinite Suspensions

Commentary

In Massachusetts, suspensions from the practice of law may be for a specific term or indefinite. The team recognizes the history of the use of indefinite suspensions in Massachusetts as well as the Court's position that severe sanctions imposed in cases involving the mishandling of client funds should act as a strong deterrent to lawyers and demonstrate to the public that the Court and the discipline system are protecting its interests. *Matter of Schoepfer*, 426 Mass. 183, 687 N.E. 2d 391 (1997). The *Schoepfer* case more clearly articulated the Court's position regarding sanctions for the mishandling of client funds as set forth in "The Three Attorneys Case," *Matter of Discipline of An Attorney*, 392 Mass. 827, 468 N.E. 2d. 256 (1984). However, the consultation team suggests that these goals can be met without the imposition of indefinite suspensions and recommends that the Court consider their elimination.

While an indefinite suspension may be viewed as more severe than a fixed term suspension and less dire than disbarment, imposing this type of sanction does not clearly indicate to the public or the profession that there is a distinction between acts of misconduct of differing severity. Affixing a specified period of time to a suspension does indicate gradations of severity. Further, the uncertainty that accompanies an indefinite suspension could be viewed as punitive. Indefinite suspensions may also pose difficulties for other jurisdictions that do not impose these sanctions and that seek to impose reciprocal discipline upon receipt of a Massachusetts case.

Section 4 of Supreme Judicial Court Rule 4:01, entitled Types of Discipline, does not refer specifically to indefinite suspensions, although this type of sanction is referenced elsewhere in that Rule. For example, Sections 17 (8) and 18 (2) of Supreme Judicial Court Rule 4:01 refer to lawyers who have been suspended for indefinite periods of time and provide when those lawyers may apply for reinstatement under varying circumstances. Section 18 (3) of Supreme Judicial Court Rule 4:01 currently allows a lawyer who has been indefinitely suspended to seek the Court's permission to work as a paralegal during the course of that suspension after the passage of four years of active suspension. As noted in Recommendation Twelve, the ABA Standing Committee on Professional Discipline does not recommend that the Court allow a disbarred or suspended lawyer to work as a paralegal during the period of discipline.

Case law in Massachusetts provides for indefinite suspensions or disbarment as the presumptive sanctions for certain types of misconduct. The Court has held that disbarment or indefinite suspension is the presumptive sanction in cases where a lawyer intends to deprive a client of funds, either permanently or temporarily, or where a client is, in fact, deprived of funds, regardless of the attorney's intent. *See, e.g., Matter of Johnson*, 444 Mass. 1002, 827 N.E. 2d 206 (2005); and *Matter of Schoepfer*, 426 Mass. 183, 687 N.E. 2d 391 (1997).

Disbarment or indefinite suspension is also the sanction typically imposed upon a lawyer who has been convicted of a felony. *See, e.g., Matter of Concemi*, 422 Mass. 326, 662 N.E. 2d 1030 (1996).

Under the current rules, a lawyer who has been suspended indefinitely may apply for reinstatement after the expiration of five years from the effective date of the court's sanction order. A lawyer who has been disbarred may apply for reinstatement after the expiration of eight years from the effective date of that sanction. Lawyers suspended for a fixed term exceeding one year may apply for reinstatement after the expiration of the period of time specified in the order.

The length of time of a suspension should be fixed and based upon consideration of the nature and extent of the misconduct and any mitigating or aggravating factors. Rule 10, *ABA Model Rules for Lawyer Disciplinary Enforcement*. The Model Rules suggest that the term of a suspension not exceed three years. Some jurisdictions impose suspensions for fixed periods of five or more years. The consultation team believes that if misconduct is so severe that a three-year suspension is not sufficient, the lawyer should be disbarred.

Recommendation 15: The Court Should Amend Supreme Judicial Court Rule 4:01 To Provide For Probation and Stayed Suspensions As Sanctions And To Set Forth Specific Requirements For The Imposition, Monitoring and Revocation of Probation

Commentary

Section 4 of Supreme Judicial Court Rule 4:01 does not include probation or stayed suspensions in conjunction with probation as disciplinary sanctions. However, Section 3 (1) of that Rule states that a lawyer's failure to comply with a condition of probation constitutes misconduct and grounds for the imposition of appropriate discipline. The team was advised that lawyers are in fact placed on probation with stayed suspensions in appropriate circumstances. This typically occurs as a form of discipline by agreement where the Bar Counsel and respondent agree upon a sanction for admitted misconduct.

Currently, if Bar Counsel determines that a lawyer placed on probation has violated the terms of that sanction, Bar Counsel must initiate a separate formal disciplinary proceeding to prosecute the probation violation. There currently exists no summary procedure by which to prosecute such matters.

The use of probation in appropriate cases, despite a lack of rules relating to the imposition and revocation of probation, is laudable. The enactment of such rules will, however, provide appropriate guidance to Bar Counsel, lawyers and the public. As a result, the team recommends that the Court amend Section 4 of Supreme Judicial Court Rule 4:01 to provide for probation and stayed suspensions in conjunction with probation as disciplinary sanctions. The team also recommends that the Court adopt specific rules setting forth specific requirements for the imposition, monitoring and revocation of probation. Corresponding changes should be made to the Rules of the Board of Bar Examiners.

Probation is different than the alternatives to discipline program described in Recommendation Thirteen. Probation should be imposed after the filing of formal charges. Cases should only be diverted to alternatives to discipline programs prior to the filing of formal charges. Diversion or alternatives to discipline programs should only be used for matters involving lesser misconduct that do not require further involvement by the disciplinary system. Matters for which a respondent is placed on probation remain in the disciplinary system. Probation is not another form of diversion; it is a separate public disciplinary sanction. If a matter rises to the level where the filing of formal charges is warranted, diversion is inappropriate.

Probation is an appropriate sanction where a lawyer can perform legal services but needs supervision and monitoring. Probation should be used only in those cases where there is little likelihood that the respondent will cause harm during the period of rehabilitation and the conditions of probation can be adequately supervised. Placing a lawyer on probation under these circumstances, with or without a stayed suspension, protects the public and acts to

prevent future misconduct by addressing the problem(s) that led to the filing of disciplinary charges.

A detailed probation rule should provide necessary guidance to the disciplinary agency and lawyers with respect to the types of cases for which probation is appropriate. The team recommends that a separate probation rule adopted by the Court set forth in general terms the requirements for imposition of probation. These include: (1) the lawyer can perform legal services without causing the courts or legal profession to fall into disrepute; (2) the lawyer is unlikely to harm the public during the period of rehabilitation; (3) necessary conditions of probation can be formulated and adequately supervised; (4) the respondent has a temporary or minor disability that does not require transfer to inactive status; and (5) the respondent has not committed misconduct warranting disbarment.

The rule should provide that the order placing a respondent on probation must state unambiguously each specific condition of probation. Placing the exact conditions of probation in the Court's order lets the respondent know exactly what is expected and what will constitute a lack of compliance that could lead to a revocation of probation and the imposition of suspension. The conditions should take into consideration the nature and circumstances of the misconduct and the history, character and condition of the respondent. Specific conditions may include: (1) supervision of client trust accounts as the Court may direct; (2) limitations on practice; (3) psychological counseling and treatment; (4) abstinence from drugs or alcohol; (5) random substance testing; (6) restitution; (7) successful completion of the Multistate Professional Responsibility Examination; (8) successful completion of a course of study; (9) regular, periodic reports to the Office Bar Counsel; and (10) the payment of disciplinary costs and the costs associated with the imposition and enforcement of the probation. The terms of probation should specify periodic review of the order of probation and provide a means to supervise the progress of the probationer. The team also recommends that the probation rule include a provision stating that, prior to the termination of a period of probation, probationers must file an affidavit with the Court stating that they have complied with the terms of probation. Probationers should be required to bear the costs and expenses associated with imposition of the terms and conditions of the probation.

An effective means of monitoring probationers is essential to the successful use of probation as a disciplinary sanction. As a result, the rule should provide for the administration of probation under the control of the Office of Bar Counsel. The administration of the probation program should be conducted by Bar Counsel's Office in such a way that it does not impinge upon the hard work of the staff to achieve and maintain efficiency in the processing of cases. As a result, the Office of Bar Counsel should be provided with appropriate resources (staff and funding) for this new and necessary obligation. The team was advised that in Massachusetts, the Lawyers Concerned for Lawyers Program would be willing and able to provide qualified probation monitors for most situations, including law office practice monitoring. Given the nature of the Lawyers Concerned for Lawyers Program, which is funded by the Court, the team believes that this is a viable option in Massachusetts. If there are instances where the Lawyers Concerned for Lawyers Program cannot effectively serve as probation monitors, the team suggests that the Office of Bar Counsel select appropriate

probation monitors (e.g., supervising attorneys, accountants and mental health care professionals) and work with those individuals to ensure that the terms of probation are met.

In order for the probation process to be successful, probation monitors must report to the Office of Bar Counsel regarding the probationer's progress. The monitor's only role is to supervise the monitored lawyer in accordance with the terms of the probation and to report compliance or noncompliance to the Office of Bar Counsel. The monitor is not to be a twelve-step or other recovery program sponsor for the probationer. Any probation rule adopted by the Court should provide that the probationer must be required to sign a release authorizing the monitor to provide information to the Office of Bar Counsel. Additionally, the rule should provide immunity for probation monitors.

Probation monitors should be required to immediately report any instances of noncompliance to the Office of Bar Counsel. The Court should adopt a rule providing that upon receipt of such a report, Bar Counsel's office may, if appropriate, file a petition with the Court setting forth the probationer's failure to comply with the conditions of probation, and requesting an order to show cause why probation should not be revoked and any stay of suspension vacated. The Court should provide the probationer with a short time period, fourteen to twenty-one days, in which to respond to the order to show cause. After consideration of the lawyer's response to the order to show cause, the Court may take whatever action it deems appropriate, including revocation of the probation and the imposition of the stayed suspension or modification of the terms of the probation. This summary proceeding will save time and resources and promptly remove the risk to the public and the profession that a lawyer who is not complying with the terms of probation poses.

The Office of Bar Counsel should work with the Oversight Committee of the Board to develop specific procedures for screening and selecting probation monitors other than those associated with the Lawyers Concerned for Lawyers Program. Promulgating a policy for the screening and selection of a roster of qualified probation monitors by the Office of Bar Counsel will better serve the system, the public and respondents. The Office of Bar Counsel may also wish to consult with the Director of the Lawyers Concerned for Lawyers Program to develop criteria for screening and selecting other probation monitors. The Office of Bar Counsel should also develop a policies and procedures manual for appointing, supervising and removing the monitors, and guidelines for the nature and contents of monitor reports to the Office Bar Counsel. A copy of the Supreme Court of Louisiana's Procedural Rules for Probation Monitors is attached to this Report as Appendix B.

Adequate and regular training of probation monitors is vital to the successful use of probation. The Office of Bar Counsel and the Oversight Committee of the Board should develop training materials and curricula for probation monitors. Other jurisdictions that have training programs for probation monitors in place, including Louisiana, as well as the staff of the Massachusetts Lawyers Concerned for Lawyers Program should be consulted. All probation monitors should be required to attend training at least bi-annually.

Recommendation 16: The Supreme Judicial Court Should Continue To Use, And The Rules of The Board of Bar Overseers Should Be Amended To Require Hearing Committees, Special Hearing Officers and the Board To Use and Cite To The ABA Standards for Imposing Lawyer Sanctions

Commentary

The *ABA Standards for Imposing Lawyer Sanctions* (Sanctions Standards) provide a straight-forward, easy to use methodology for ensuring consistency. They are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case. The Sanctions Standards attempt to ensure that such factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant aggravating and mitigating circumstances are considered at the appropriate time.

The Supreme Judicial Court uses and cites to the ABA Sanctions Standards in its opinions. The Court, in other opinions, has set forth presumptive sanctions for specified types of misconduct, using the Sanctions Standards in support of its position. For example, the Court in M*atter of Concemi*, 422 Mass. 326, 662 N.E. 2d 1030 (1996) cited the Standards with approval when holding that felony convictions typically warrant disbarment.

The team was advised that the parties, particularly Bar Counsel, frequently cite the Sanctions Standards during closing argument and in post-hearing submissions to Hearing Committees. The Hearing Committees use the Sanctions Standards in large part when addressing issues of mitigation and aggravation. The same is true of the Board's use of the Sanctions Standards at the appellate level, whether the Board is acting though an Appeal Panel or en banc. In 1997, the Board, for all intents and purposes, adopted the Sanctions Standards as guidelines for future cases involving neglect of client matters. S*ee, Matter of Kane*, 13 Mass. Att'y Disc. R. 321, 327-329 (1997). The team did not, however, find reference to the Sanctions Standards in the training materials for system volunteers that were provided.

In order to enhance the sanction recommendations ultimately provided to the Court, the consultation team recommends that the Rules of the Board of Bar Overseers be amended to require citation to the Sanctions Standards in post-trial submissions and in adjudicator's reports and recommendations, in addition to other authority. Rule10(c), *ABA Model Rules for Lawyer Disciplinary Enforcement*. In making this recommendation, the team is not being critical of the reports and recommendations submitted by the system volunteers and the lawyers in the Office of the General Counsel for the Board. The team received information from various sources that those reports are well written. Rather, it is the goal of the team in making this recommendation to further assist the Hearing Committees and the Board in providing the most complete analysis possible for the Court's ultimate consideration. Further, regular use of the Sanctions Standards will assist those at the adjudicative level in prioritizing cases awaiting decisions.

VII. PREVENTION MECHANISMS

Recommendation 17: The Court Should Study Whether To Institute The Mandatory Arbitration of Lawyer/Client Fee Disputes In the Future

Commentary

A fee dispute arbitration system that is mandatory for the lawyer eliminates the overwhelming advantage lawyers have over the majority of clients who are of modest means and have only the most rudimentary knowledge of the law. When a legitimate fee dispute arises and the lawyer enters arbitration in good faith, the client's opinion of both the lawyer and the profession can be improved. The experience of those states that provide mandatory fee arbitration (Alaska, California, Maine, New Jersey, North Carolina, South Carolina, Washington D.C. and Wyoming) demonstrates that these programs can work without being unduly burdensome on the profession. The team recommends that the Court study whether to adopt a rule providing for mandatory arbitration of lawyer-client fee disputes.

As noted earlier in this Report, the Attorney Consumer Assistance Program (A.C.A.P.) is an excellent addition to the lawyer regulatory system in Massachusetts. One of the services that the A.C.A.P. provides is to refer the public to other programs that can assist them with complaints about lawyers that do not fall under the jurisdiction of the disciplinary agency. One type of complaint that results in such a referral is fee disputes. The consultation team was advised that approximately 10% of the inquiries/complaints received by A.C.A.P. involve fees. The A.C.A.P. handles approximately 6000 matters per year. Staff for the A.C.A.P maintains a list of the various fee dispute committees available for referral. That information is provided to callers who may need this type of assistance.

Currently, the arbitration of fee disputes in Massachusettes is voluntary. The Massachusetts Bar Association has a Legal Fee Arbitration Board. The purpose of that program, which the team was told has been in existence for more than twenty-five years, is to help resolve legal fee disputes between lawyers and between clients and their lawyers. Detailed information for consumers about this program can be found at: http://www.massbar.org/lawhelp/legal_info/index.php?sw=311 . The legal fee arbitration panel of the Worcester County Bar Association is available to help resolve fee disputes between attorneys and their clients and the Hampden County Bar Association offers arbitration services.

The adoption of a mandatory fee arbitration program would enhance the effectiveness of the A.C.A.P. program and further encourage the informal resolution of fee disputes. As in disciplinary matters, complaints that do not state legitimate grounds for dispute should be screened out. The team understands that in addition to the bar association programs mentioned above, there are also a number of court approved Alternative Dispute Resolution

providers in Massachusetts who could serve as arbitrators of fee disputes if the Court so desired. The *ABA Model Rules for Fee Arbitration* are attached to this Report as Appendix C. A chart setting forth the states with mandatory fee arbitration programs can be found at www.abanet.org/cpr/clientpro/fee_arb_chart.pdf. The ABA Standing Committee on Client Protection is available to provide the Court with additional information regarding these mandatory fee arbitration programs.

VIII. CONCLUSION

As noted throughout this Report, the consultation team was impressed by the dedication of the Court, the volunteers and the professional staff of the disciplinary agency. The desire of these individuals to eliminate delay from the system and achieve other improvements is highly commendable. The team hopes that the recommendations contained in this Report will assist the Court in the implementation of any desired changes.

As part of the discipline system consultation program, the ABA Standing Committee on Professional Discipline is available for further consultation with the Court if so requested.

APPENDIX A

BARBARA KERR HOWE is Chair of the ABA Standing Committee on Professional Discipline. She was an Associate Judge of the Circuit Court for Baltimore County, Maryland, and now serves in 'senior status' throughout the courts in Maryland. After her appointment in 1988, she was elected to that bench in 1990 for a fifteen-year term. She served as a director of the Attorney Grievance Commission of Maryland from 1983-1985 after having served on its Inquiry Panels for a number of years. She was a member of the Judicial Disabilities Commission of Maryland from 1991 through 1995, having been its Chair during 1995. She is a graduate of the University of Maryland Law School. She was a partner in a law firm engaged in general practice.

She was President of the Maryland State Bar Association,1996-97, a member of the ABA Standing Committee on Professionalism from 1995- 1998, chair of the Professionalism and Professional Responsibility Committee of the ABA General Practice Solo and Small Firm Section, a member and director of the American Judicature Society, the National Association of Women Judges. She is a fellow of the Maryland Bar Foundation and of the American Bar Foundation.

ROBERT L. OSTERTAG is a member of the ABA Standing Committee on Professional Discipline. He is a partner in Ostertag O'Leary & Barrett of Poughkeepsie, New York. He is adjunct professor at Fordham Unversity School of Law. He has served as a member of the ABA House of Delegates, the ABA Gavel Awards Committee, 1987-890, the ABA Special Committee on Solo and Small Firm Practitioners, 1992-95, and as President of the New York State Bar Association, 1991-92. He received the ABA General Practice Section's Lifetime Achievement Award in 2004 and is a life fellow of the American Bar Foundation. He is a graduate of Fordham University, St. John's University School of Law and holds an LL.M. from Georgetown University Law Center.

WILLIAM P. SMITH, III, is a member of the ABA Standing Committee on Professional Discipline. He became General Counsel for the State Bar of Georgia in December 1984. The General Counsel heads a staff of nineteen, including nine other attorneys and one investigator. The department's main function is to work with the State Disciplinary Board of the State Bar in its handling of grievances against lawyers and recommendations for disciplinary action.

Mr. Smith is a DeKalb County, Georgia, native. A graduate of Emory University Law School, he practiced general and trial law in Decatur, GA from the time of his admission to the bar in 1965 until he accepted his present position. He has served as a member of the Board of Governors and the Executive Committee of the State Bar of Georgia. He is a Past President of the Decatur-DeKalb Bar Association; a past member of the Board of Directors of the DeKalb Volunteer Lawyers Foundation; a member of the Lawyers Club of Atlanta; a Fellow of the Georgia Bar Foundation; and past President of the National Organization of Bar Counsel.

MARY M. DEVLIN is Regulation Counsel, American Bar Association Center for Professional Responsibility, where she directs the Association's efforts in improving lawyer and judicial disciplinary enforcement for the ABA Standing Committee on Professional Discipline. She has been involved in professional ethics and discipline for over twenty years, previously serving as counsel to the American Medical Association's Council on Ethical and Judicial Affairs. She is the author of over 50 articles. Her J.D. from I.I.T. Chicago-Kent College of Law was with honors. She received an LL.M. from DePaul University College of Law in 1996. She has a master's degree in library science from Dominican University and a master's degree in history from the University of Illinois at Chicago. She is a Life Fellow of the American Bar Foundation and also serves as counsel to the ABA Standing Committee on Amicus Curiae Briefs.

ELLYN S. ROSEN is the Associate Regulation Counsel at the American Bar Association Center for Professional Responsibility, where she serves as counsel to the ABA Standing Committee on Professional Discipline and the Joint Committee on Lawyer Regulation. She also serves as staff liaison to the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers. Previously, she was a senior litigation counsel with the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, where she investigated and prosecuted allegations of lawyer misconduct for six and one-half years. Ms. Rosen co-chaired the Chicago Bar Association's Young Lawyers Section Professional Responsibility Committee, for the 1997-98 through 1999-00 bar years. She is an investigator and interviewer for the Alliance of Bar Associations for Judicial Evaluations. The Alliance of Bar Associations consists of the Illinois State Bar Association and ten special interest bar associations that evaluate candidates for election and appointment to the bench in Illinois. She received her J.D. with honors from the Indiana University School of Law in Bloomington, Indiana.

APPENDIX B

APPENDIX C. PROCEDURAL RULES FOR PROBATION MONITORS

Rule 1. Selection

a) The Disciplinary Board shall establish a pool of attorneys licensed to practice in the State who would agree to serve as probation monitors. All actions of probation monitors shall be pursuant to Rule XIX. Probation monitors shall be considered as members of the Disciplinary system.

b) Selection of the probation monitor shall be made by the Disciplinary Board or its designee. Under no circumstance shall the probation monitor be engaged in any representation of the respondent or be related to respondent by blood or marriage to the third degree nor be engaged in legal or professional practice, business or social concerns with the respondent.

c) The probation monitor shall be a resident of the State of Louisiana.

d) While respondent's input into the selection of the probation monitor may be considered, the respondent shall have no right to approve or veto of the probation monitor.

e) All terms of probation shall be written and agreed to by the probation monitor and the respondent prior to the commencement of the probation period.

Rule 2. Duties of Probation Monitor

Probation monitors shall perform all aspects of the probation monitoring as set forth in the specific sanction. A probation monitor's obligation is to ascertain that respondent is in compliance with the probation conditions and promptly report any such compliance or noncompliance to Disciplinary Counsel. The probation monitor shall submit reports to the Disciplinary Counsel not less than quarterly. It shall be the obligation of the Disciplinary Counsel to investigate the noncompliance as reported by the probation monitor. If a probation monitor is unable to serve or does not perform his/her duties, the Disciplinary Board, or its designee who selected the monitor, shall replace said monitor.

Rule 3. Standards of Review

a) The probation monitor shall review the files and accounts of the respondent insofar as probation is required, i.e. if the respondent is on probation as a result of commingling, the probation monitor shall review the financial records of the respondent to ascertain that no commingling continues. Similarly, if the respondent is on probation for neglect of legal matters, the probation monitor shall review the substance of the respondent's files.

b) The probation monitor shall have the right to review any of respondent's files which it deems necessary in order to complete his/her obligations.

c) Such review shall take place regularly as deemed necessary by the probation monitor. Respondent shall make himself, members of his staff, both full time, part time, and independent contractors reasonably available for a conference with the probation monitor. Any expenses incurred by way of such conferences shall be paid directly by the respondent.

d) In connection with the reviews, respondent, without written or oral request, shall furnish to probation monitor a written update of the respondent's activities which fall within the ambit of the probation requirements.

e) The failure to furnish such written reports shall constitute a basis for revocation of probation.

f) Respondents shall timely provide appropriate waivers of confidentiality to probation monitors insofar as physicians, banking relations, accountants, and any other confidential relationships which may exist between respondent and other parties to the extent such information is necessary for the probation monitor to perform his/her services.

g) In cases where the respondent is a recovering drug or alcohol addict, the probation monitor shall have the right to demand appropriate laboratory tests, if required. Failure of the respondent to provide the opportunity for such lab tests should be considered as a violation.

Rule 4. Compensation

Probation monitors shall be reimbursed for their reasonable expenses incurred in performing probation services. All such costs shall be paid directly by the respondent. Failure of the respondent to promptly pay costs shall be grounds for revocation of probation.

Rule 5. Revocation

A. Non-Compliance or Other Rules of Professional Conduct Violation.

When a probation monitor reports that a respondent is not complying with the terms of probation, or when Disciplinary Counsel otherwise becomes aware of respondent's noncompliance or further violations of the Rules of Professional Conduct, Disciplinary Counsel shall investigate and, if appropriate, file a request for revocation of the probation.

B. Emergency.

Upon receipt of sufficient evidence demonstrating that respondent has violated his/her probation and/or committed a violation of the Rules of Professional Conduct and poses a substantial threat of harm to the public, Disciplinary Counsel shall submit the evidence to the Court with a request for an interim suspension and revocation of probation. Disciplinary Counsel shall follow the procedure outlined in Section 19B, Interim Suspension for Threat of Harm.

C. Hearing in Non-Emergency Situations.

Upon receipt of sufficient evidence demonstrating that respondent has violated his/her probation and/or committed a violation of the Rules of Professional Conduct, Disciplinary Counsel shall submit the evidence to the Adjudicative Committee with a request for a revocation of probation.

A hearing with notice as provided in Rule XIX shall be held by the Adjudicative Committee panel within thirty days of Disciplinary Counsel's request for revocation. The panel shall immediately make a recommendation and submit it to the Adjudicative Committee for a vote. The opinion shall be issued to the Court within ten days of the hearing.

CREDIT(S) Approved by Supreme Court Feb. 14, 1995. Amended and effective Oct. 10, 1996; amended and effective March 16, 1998.

<General Materials (GM) - References, Annotations, or Tables>

Sup. Ct. Rules, Rule 19, App. C, Lawyer Disciplinary Enforcement Rules, LA ST S CT DISC Rule 19, App. C

Current with amendments received through August 1, 2005

APPENDIX C

ABA *MODEL RULES FOR FEE ARBITRATION*

Adopted by the American Bar Association
House of Delegates on February 23, 1995.

PREFACE

The Model Rules for Fee Arbitration implement Recommendation 3 of the Report of the Commission on Evaluation of Disciplinary Enforcement (the "McKay Commission,"February 1992) in which the American Bar Association called for states to expand their systems of lawyer regulation by establishing mechanisms to resolve disputes between lawyers and clients and to handle non-disciplinary complaints about lawyers. The McKay Commission included a mandatory fee arbitration program its court-established dispute resolution mechanisms.

Rule 1. GENERAL PRINCIPLES AND JURISDICTION

A. Definitions. The following definitions shall apply in all fee arbitration proceedings.

(1) "Client" means a person or entity who directly or through an authorized representative consults, retains or secures legal service or advice from a lawyer in the lawyer's professional capacity.

(2) "Commission" means the Fee Arbitration Commission.

(3) "Decision" means the determination made by the panel in a fee arbitration proceeding.

(4) "Lawyer" means a person admitted to the practice of law in [name of jurisdiction], or any other person who appears, participates or otherwise engages in the practice of law in this state, regardless of the status of his or her license. In these rules, the term "lawyer" includes a lawyer's assignee.

(5) "Panel" means the arbitrator(s) assigned to hear a fee dispute and to issue a decision.

(6) "Party" means the client, lawyer, the lawyer's assignee and any third person or entity who has been joined by the client or lawyer in the proceeding.

(7) "Petition" means a written request for fee arbitration in a form approved by the Commission.

(8) "Petitioner" means the party requesting fee arbitration.

(9) "Respondent" means the party with whom the petitioner has a fee dispute.

B. Establishment; Purpose. It is the policy of the [state's highest court] to encourage the informal resolution of fee disputes between lawyers who practice law in [name of jurisdiction] and their clients and, in the event such informal resolution cannot be achieved, to provide for the arbitration of such disputes. To that end, the [state's highest court] hereby establishes through adoption of these rules, a program and procedures for the arbitration of disputes concerning any and all fees and/or costs paid, charged, or claimed for professional services by lawyers.

C. Arbitration Mandatory for Lawyers. Fee arbitration pursuant to these rules is voluntary for clients and mandatory for lawyers if commenced by a client.

D. Effect of Arbitration.

(1) The Fee Arbitration is binding where all parties have agreed in writing that it will be binding.

(2) In the absence of a written agreement to be bound by the arbitration, the decision automatically becomes binding, unless, as permitted under Rule 7.B., any party seeks a trial de novo pursuant to the [jurisdiction's rules of civil procedure] within 30 days after service of the decision. This 30 day time period shall not be extended by an application for modification under these rules.

(3) After all parties have agreed in writing to be bound by an arbitration award, a party may not withdraw from that agreement unless all parties agree to the withdrawal in writing. At any time during the proceedings, the parties may agree in writing to be bound by the decision.

E. Jurisdiction. Any lawyer, as defined in Rule 1.A(4), is subject to these rules for fee arbitration.

F. Disputes not Subject to Arbitration. These rules do not apply to the following:

(1) Disputes where the lawyer is also admitted to practice in another jurisdiction, the lawyer maintains no office in [name of jurisdiction], and no portion of the legal services was rendered in [name of jurisdiction];

(2) Disputes where the client seeks affirmative relief for damages against the lawyer based upon alleged malpractice or professional misconduct;

(3) Disputes where entitlement to and the amount of the fees and/or costs charged or paid to a lawyer by the client or on the client's behalf have been determined by court order, rule, or decision;

(4) Disputes where a third person is responsible for payment of the fees and the client fails to join in the request for arbitration; and

(5) Disputes where the request for arbitration is filed more than [four] year(s) after the lawyer-client relationship has been terminated or more than [four] year(s) after the final billing has been received by the client, whichever is later, unless a civil action concerning the disputed amount is not barred by the statute of limitations.

G. Notice of Right to Arbitration; Stay of Proceedings; Waiver by Client.

(1) Prior to or at the time of service of a summons in a civil action against his or her client for the recovery of fees, costs, or both for professional services rendered, a lawyer shall serve upon the client [by certified mail return receipt requested] a written notice of the client's right to arbitrate. The notice, in a form approved by the Commission, shall include a provision advising the client that failure to file a Petition for Fee Arbitration within 30 days of service of notice of the right to arbitrate shall constitute a waiver of the right to arbitrate. Failure to give this notice shall be grounds for dismissal of the civil action.

(2) If a lawyer commences a fee collection action in any court, the court shall issue an order of stay upon the client giving notice to the court and the lawyer that a Petition for Arbitration was filed with the commission within [thirty] days of service of the notice of the right to arbitrate.

(3) After a client files a Petition, the lawyer shall refrain from any non-judicial collection activities related to the fees and/or costs in dispute pending the outcome of the arbitration.

(4) Unless all parties agree in writing to the arbitration, the right of the client to petition or maintain an arbitration is waived if:

(a) the client fails to file a Petition for Arbitration within [thirty] days of service of the notice of right to arbitrate pursuant to these rules; or

(b) the client commences or maintains a civil action or files any pleading seeking judicial resolution of the fee dispute, or seeking affirmative relief against the lawyer for damages based upon alleged malpractice.

Comment

A fee arbitration system provides lawyers and clients with an out-of-court method of resolving fee disputes that is expeditious, confidential, inexpensive, and impartial. The court should ensure adequate funding for an effective program.

Although these rules only address fee arbitration, consideration should be given to the development of mediation as a component of the program as a prerequisite or alternative to fee arbitration.

A client who believes he or she may have been overcharged by a lawyer may have the lawyer's fee reviewed without incurring the expense of formal litigation. Participation in the Fee Arbitration Program is mandatory for lawyers if the request for arbitration is commenced by a client. The decision is binding only upon written agreement of the parties. In the absence of a written agreement to be bound by the arbitration decision, any party may seek a trial de novo within 30 days after service of the decision. The decision becomes binding if no party seeks a trial de novo within the 30 day period. The program is voluntary for the client since the lawyer regulatory system has no power to regulate the consumer of legal services. However, nothing in these rules precludes a lawyer and a client from entering into a contract to participate in binding arbitration under these rules as permitted by law.

A lawyer must notify a client of the availability of the Fee Arbitration Program prior to or at the time of service of a summons in a civil action against the client to recover fee and/or costs for professional services. The rule provides that notice be sent by certified mail return receipt requested. However, a jurisdiction may substitute such other means of service as will reasonably establish receipt. The client must file a Petition for Fee Arbitration within [thirty] days of service of such notice or the client waives the right to petition or maintain an arbitration proceeding under these rules. If all parties agree, the fee arbitration can proceed even if the client did not file the Petition for Fee Arbitration within the [thirty] day period. The client also waives the right to petition or maintain an arbitration if the client commences or maintains a civil action or files any pleading seeking judicial resolution of the fee dispute or seeking affirmative relief against the lawyer for damages based on alleged malpractice. This prevents the same facts from being the subject matter of the arbitration and a civil action. Nothing herein precludes a client from filing a complaint with the disciplinary authority. Nothing in these rules prevents the filing of a malpractice action after a decision is rendered in the fee arbitration proceeding. In accordance with Rule 7.B.(4), a decision under these rules is not admissible in a subsequent malpractice action.

The scope of these rules includes costs as well as fees. In many cases, fees and costs are inextricably linked. The fee arbitration process should be able to resolve both issues in one process.

The Fee Arbitration Program can be expanded to handle disputes between lawyers if all parties agree to be bound by the decision of the panel.

An alternative approach, which currently works effectively in those jurisdictions where it has been adopted, is to provide for arbitration which is both mandatory and binding in all cases. Under such a system, the arbitration decision is binding on the parties subject to appeal only in cases of demonstrable and fundamental unfairness in the procedures utilized in deciding the matter.

Rule 2. FEE ARBITRATION COMMISSION

A. Appointment of Commission. The [state's highest court] shall appoint a Fee Arbitration Commission to administer the Fee Arbitration Program. The [state's highest court] shall designate one member to serve as Chair of the Commission.

B. Composition. The Commission shall consist of [nine] members of whom one-third shall be nonlawyers. Members shall be appointed for terms of three years or until a successor has been appointed. Appointments shall be on a staggered basis so that the number of terms expiring shall be approximately the same each year. No members shall be appointed for more than two consecutive full terms, but members appointed for less than a full term (either originally or to fill a vacancy) may serve two full terms in addition to such part of a term.

C. Duties of the Commission. The Commission shall have the following powers and duties.

(1) to appoint, remove and provide appropriate training for lawyer and nonlawyer arbitrators and arbitration panels;

(2) to interpret these rules;

(3) to approve forms;

(4) to establish written procedures that afford a full and equal opportunity to all parties to present relevant evidence;

(5) to issue an annual report and periodic policy recommendations, as needed, to the [state's highest court] regarding the program;

(6) to maintain all records of the Fee Arbitration Program;

(7) to determine challenges for cause where an arbitrator has not voluntarily acceded to a challenge;

(8) to educate the public and the bar about the Fee Arbitration Program; and

(9) to perform all acts necessary for the effective operation of the program.

Comment

Overall authority to administer the Fee Arbitration Program is delegated by the state's highest court to the Commission. Both lawyers and nonlawyer members serve on the Commission. Members are appointed by the court for three year terms. The court should ensure diversity in the membership of the Commission.

Members may be appointed for a period not to exceed two consecutive full terms and a portion of an additional term, if appointed originally to less than a full term. A rotation

system is employed in the appointment of members so that, generally, the terms of one-third of the members expire annually. This procedure preserves continuity while inviting the fresh ideas which new personnel inevitably bring to a task.

The Commission has the duty to inform the bar and the public about the Fee Arbitration Program through such means as brochures, public service announcements, and any other means available. There should be a central place where the public can call with questions about lawyers and which can refer appropriate matters to the Fee Arbitration Program. Members of the bar should be encouraged to inform any member of the public known to have a fee dispute with a lawyer about the right to seek fee arbitration or to pursue other available means to resolve the dispute, such as mediation.

Depending on funding, pro bono requirements, and other considerations, the Commission may authorize the reimbursement of reasonable costs and expenses to its members and to arbitrators. In larger jurisdictions, the Commission may employ staff to perform functions delegated by the Commission. The Commission can authorize local bar associations to sponsor and conduct fee arbitration programs. However, a client who believes he or she may not be able to obtain a fair resolution at the local level should be permitted to utilize the statewide program.

Rule 3. ARBITRATORS

A. List of Approved Arbitrators. The Commission shall maintain a list of approved arbitrators and shall adopt written standards for the appointment of the arbitrators. Such standards should ensure appropriate training and experience for arbitrators as well as diversity in the background and experience of the arbitrators. Arbitrators shall be appointed for terms of [three] years and may be reappointed. For good cause, the Commission may remove an arbitrator from the list of approved arbitrators, and may appoint a replacement member to serve the balance of the term of the removed member.

B. Panels. The Commission shall appoint panels from the list of approved arbitrators. For disputes involving [$7,500] or more, the panel shall consist of three arbitrators of whom one shall be a nonlawyer member For disputes involving less than [$7,500], or in any case if the parties so stipulate, the panel shall consist of a sole arbitrator who shall be a lawyer. If the panel consists of three members, the Commission shall designate one member to act as Chair of the panel and to preside at the arbitration hearing.

C. Conflicts of Interest. Within [five] days of the notification of appointment to a panel, an arbitrator shall notify the Commission of any conflict of interest with a party to the arbitration as defined in the ABA Code of Judicial Conduct with respect to part-time judges. Upon notification of the conflict, the Commission shall appoint a replacement from the list of approved arbitrators.

D. Challenges for Cause. A party may challenge any arbitrator for cause. A challenge for cause naming the arbitrator and the reason for the challenge shall be filed within

[fifteen] days after service of the notice of appointment. An arbitrator shall accede to a reasonable challenge and the Commission shall appoint a replacement. If an arbitrator does not voluntarily accede, the Commission shall decide whether to appoint a replacement. The decision of the Commission on challenges shall be final.

E. Duties. The panel shall have the following powers and duties.

(1) to take and hear evidence pertaining to the proceeding;

(2) to administer oaths and affirmations;

(3) to compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding, and consider challenges to the validity of subpoenas;

(4) to issue decisions; and

(5) to perform all acts necessary to conduct an effective arbitration hearing.

Comment

The Commission appoints both lawyers and nonlawyers to serve as arbitrators for [three] year renewable terms, and maintains a list of approved arbitrators. When a Petition is received, the Commission appoints from the list of approved arbitrators a panel of one or three arbitrators to hear the matter, depending on the amount in dispute. For larger jurisdictions, the Commission may hire staff or designate a presiding arbitrator to handle the appointment of panels or other administrative tasks as delegated by the Commission. The number of people on the list of approved arbitrators should not be so large as to prevent the participating arbitrators from obtaining sufficient experience in the program.

Appointments to the list of approved arbitrators should represent all segments of the profession and the general population, including diversity on the basis of race, gender and practice setting. Arbitrators should also be dispersed throughout the state to increase access to the fee arbitration process.

The Commission should adopt written standards for appointment of arbitrators which may include compliance with training requirements, ability to meet minimum time and case commitments, years in practice and experience. All panels of more than one arbitrator should include one nonlawyer member.

Members of panels exercise a quasi-judicial role and should, therefore, be disqualified upon the same grounds and conditions applicable to judges. The Commission may wish to provide that within [fifteen] days after service of the notice of appointment, any party may file one peremptory challenge. In the event of such a challenge, the Commission should relieve the challenged arbitrator and appoint a replacement.

Panels do not render advisory opinions but, rather, adjudicate fee controversies between lawyers and clients.

In jurisdictions with a high volume of arbitration cases, consideration should be given to having pre-set arbitration panels which meet at specified times to simplify the scheduling of hearings.

Rule 4. COMMENCEMENT OF PROCEEDINGS

A. Petition to Arbitrate. A fee arbitration proceeding shall commence with the filing of a Petition for Arbitration on a form approved by the Commission [and paying the appropriate filing fee as established by the {state's highest court}]. Any person who is not the client of the lawyer but who has paid or may be liable for the lawyer's fees may consent to be joined by the client as a party to the arbitration. The Petition for Arbitration must be signed by the client and any other party included by the client.

B. Commission Review. The Commission will review the Petition to determine if it is properly completed and if the Commission has jurisdiction. If the Petition is not properly completed, the Commission will return it to the petitioner and specify what clarification or additional information is required. If the Commission does not have jurisdiction, the petitioner shall be so advised.

C. Service of Petition; Response. Within [five] days of the receipt of a properly completed Petition, the Commission shall serve a copy of the Petition, along with a Fee Arbitration Response Form on the respondent. Within [twenty] days after service, the respondent shall file the completed Fee Arbitration Response Form with the Commission which shall forward a copy to all other parties. The Commission shall serve a copy of the Petition for Arbitration and a Fee Arbitration Response Form upon the law firm, if any, with which a lawyer-party is associated. If the respondent is a lawyer, the respondent shall set forth in the response the name of any other lawyer or law firm who the lawyer claims is responsible for all or part of the client's claim. Within [five] days of receipt of the response, the Commission shall serve on the lawyer(s) or law firm(s) named in the Response a copy of the Petition for Arbitration and a Fee Arbitration Response Form for completion. Within [twenty] days after service, the lawyer(s) or law firm(s) may file the completed Fee Arbitration Response Form with the Commission which shall forward a copy to all other parties.

D. Failure of a Lawyer Respondent to Respond. Failure of a lawyer respondent to file the Fee Arbitration Response Form shall not delay the scheduling of a hearing; however, in any such case the panel may, in its discretion, refuse to consider evidence offered by the lawyer which would reasonably be expected to have been disclosed in the response.

E. Client Consent Required. If a lawyer files a Petition for Arbitration, the arbitration shall proceed only if the client files a written consent within [thirty] days of service of the Petition.

F. Settlement of Disputes. If the dispute giving rise to the Petition for Arbitration has been settled, upon reasonable confirmation of that settlement, the matter shall be dismissed by the Commission or by the panel if one has been assigned.

G. Appointment of Panel. The Commission shall, within [ten] days after receipt of the Petition for Arbitration, appoint a panel and mail to the parties written notification of the name(s) of the panel member(s) assigned to hear the matter.

Comment

The fee arbitration process begins with the filing of a Petition for Arbitration on a form approved by the Commission. The respondent has twenty days after service to return the Fee Arbitration Response Form. The process is commenced either unilaterally by a client or by the lawyer with the client's consent. If it is initiated by the client, participation is mandatory on the part of the lawyer.

The Fee Arbitration Program is designed to be simple and fast. Consequently, most cases should be concluded in an average of six months.

If a lawyer fails to timely file a Fee Arbitration Response Form, the hearing will nonetheless be held in the normal course and the panel may, in its discretion, refuse to consider evidence offered by the lawyer which would reasonably be expected to have been disclosed in the Response. This is not intended as a default procedure. It will still be necessary for the panel to determine the reasonableness of the fee.

The Commission must serve a copy of the Petition and the Fee Response Form on the law firm, if any, of which a lawyer is a member. The purpose of this rule is to assure that where a law firm is due a fee, or is obligated therefor, the law firm will have notice of the arbitration and an opportunity to participate.

Rule 5. HEARING

A. Notice of Hearing. The panel shall set the date, time and place for the hearing. The panel shall send notice of the hearing to the parties not less than [thirty] but no more than [sixty] days in advance of the hearing date, unless otherwise agreed by the parties.

B. Representation by Counsel. Any party may be represented by counsel.

C. Recording of Proceedings. A party to the proceedings may make arrangements to have the hearing reported at the party's own expense, provided notice is given to the other parties and the panel at least [five] days prior to the scheduled hearing. If a party orders a

transcript, that party shall provide a copy of the transcript to the panel free of charge. Any other party is entitled at his or her own expense to acquire a copy of the transcript by making arrangements directly with the reporter. A panel, in its discretion, may make arrangements to have a hearing recorded and the parties may obtain a copy at their own expense.

D. Continuances. For good cause shown, a panel may continue a hearing upon the request of a party or upon the panel's own motion.

E. Oaths and Affirmations. The testimony of witnesses shall be by oath or affirmation.

F. Panel Quorums. All three arbitrators shall be required for a quorum where the panel consists of three members. A panel of three arbitrators shall act with the concurrence of at least two arbitrators.

G. Appearance; Failure of a Party to Appear. Appearance by a party at a scheduled hearing shall constitute waiver by said party of any deficiency with respect to the giving of notice of hearing. The panel may proceed in the absence of any party or representative who, after due notice, fails either to be present or to obtain a continuance. A decision shall not be made solely on the default of a party. The panel shall require parties who are present to submit such evidence as the panel may require to issue a decision.

H. Waiver of Personal Appearance. Any party may waive personal appearance and submit testimony and exhibits by written declaration under oath to the panel. Such declarations shall be filed with the panel at least [ten] days prior to the hearing. If all parties, in writing, waive appearances at a hearing, the matter may be decided on the basis of written submissions. If the panel concludes that oral presentations are necessary, the panel may schedule a hearing.

I. Telephonic Hearings. In its discretion, a panel may permit a party to appear or present witness testimony at the hearing by telephonic conference call. The costs of the telephone call shall be paid by the party.

J. Stipulations. Agreements between the parties as to issues not in dispute and the voluntary exchange of documents prior to the hearing are encouraged.

K. Evidence. The panel shall accept such evidence as is relevant and material to the dispute and request additional evidence as necessary to understand and resolve the dispute. The rules of evidence [of the jurisdiction] need not be strictly followed. The parties shall be entitled to be heard, to present evidence and to cross-examine parties and witnesses. The panel shall judge the relevance and materiality of the evidence.

L. Subpoenas. Upon request of a party and for good cause shown, or on its own initiative, the panel may issue subpoenas for witnesses or documents necessary to a resolution of the dispute. The requesting party shall be responsible for service of the subpoenas.

M. Reopening of Hearing. For good cause shown, the panel may reopen the hearing at any time before a decision is issued.

N. Death or Incompetency of a Party. In the event of death or incompetency of a party, the personal representative of the deceased party or the guardian or conservator of the incompetent may be substituted.

O. Burden of Proof. The burden of proof shall be on the lawyer to prove the reasonableness of the fee by a preponderance of the evidence.

Comment

The goal of these rules is to provide a setting for hearings that is informal yet fair. To that end, the panel has discretion to grant postponements but need not permit the process to be subverted by unexcused absences. The panel will receive the evidence and testimony offered and judge its relevance and materiality. While the hearing may be conducted informally, witnesses should be required to testify under oath.

There is no provision for formal discovery; however, the panel has the power of subpoena, subject to rules of relevancy and materiality.

The burden of proof in fee arbitration is on the lawyer to prove the reasonableness of the fee by a preponderance of the evidence. This is consistent with the ABA Model Rules of Professional Conduct Rule 1.5 which provides that a lawyer's fee shall be reasonable.

The panel may consider evidence relating to claims of malpractice and professional misconduct, but only to the extent that those claims bear upon the fees, costs, or both to which the lawyer is entitled. The panel may not award affirmative relief in the form of damages for injuries underlying any such claim.

Rule 6. DECISION

A. Form of Decision. The panel's decision shall be in writing and shall include a clear statement of the amount in dispute, whether and to whom monies are due, and a brief explanation of the decision.

B. Issuance of Decision. The decision should be rendered within [thirty] days of the close of the hearing or from the end of any time period permitted by the panel for the filing of supplemental briefs or other materials. The arbitrator or panel chair shall forward the decision to the Commission which shall serve a copy of the decision on each party to the arbitration.

C. Modification of Decision.

(1) On application to the panel by a party to a fee dispute, the panel may modify or correct a decision if:

(a) there was an error in the computation of figures or a mistake in the description of a person, thing, or property referred to in the decision;

(b) the decision is imperfect in a matter of form not affecting the merits of the proceeding; or

(c) the decision needs clarification.

(2) Any party may file an application for modification with the panel within [twenty] days after service of the decision and shall serve a copy of the application on all other parties. An objection to the application must be filed with the panel within [ten] days after service of the application for modification.

(3) An application for modification shall not extend the thirty day time period to seek trial de novo under these rules.

D. Retention of Files. The Commission shall maintain all fee arbitration files for a period of [three] years from the date a decision is issued.

Comment

In order to bring a final and speedy conclusion to fee disputes, the decision of the panel is required to be in writing and should be rendered within thirty days. Discretion to extend the time period for unusually complicated or difficult matters should be provided.

Rule 7. EFFECT OF DECISION; ENFORCEMENT.

A. Compliance with Decision.

(1) Where the parties have agreed to be bound by the arbitration or have settled the dispute, the parties shall have [thirty] days from service of the written decision or the date the stipulation of settlement is signed by the parties to comply with the decision or settlement.

(2) Where there is no agreement to be bound by the arbitration, any party is entitled to a trial de novo if sought within thirty days from service of the written decision, except that if a party willfully fails to appear at the arbitration hearing, that party shall not be entitled to a trial de novo. The determination of willfulness shall be made by the court. The party who failed to appear at the arbitration shall have the burden of proving

that the failure to appear was not willful. In making its determination, the court may consider any findings made by the arbitrators on the subject of a party's failure to appear. If a trial de novo is not sought within 30 days, the decision becomes binding.

B. Trial De Novo.

(1) If there is an action pending, the trial de novo shall be initiated by filing a rejection of arbitration award and request for trial in that action within 30 days from service of the written decision.

(2) If no action is pending, the trial de novo shall be initiated by the commencement of an action in the court having jurisdiction over the amount in controversy within thirty days from the service of the written decision.

(3) The party seeking a trial de novo shall be the prevailing party if that party obtains a judgment more favorable than that provided by the arbitration award, and in all other cases the other party shall be the prevailing party. The prevailing party may, in the discretion of the court, be entitled to an allowance for reasonable attorney's fees and costs incurred in the trial de novo, which allowance shall be fixed by the court. In fixing the attorney's fees, the court shall consider the decision and determinations of the arbitrators, in addition to any other relevant evidence.

(4) Except as provided in this rule, the decision and determinations of the arbitrators shall not be admissible in any action or proceeding and shall not operate as collateral estoppel or res judicata.

C. Petition to Confirm, Correct, or Vacate the Decision.

(1) If a civil action has been stayed pursuant to these rules, any petition to confirm, correct, or vacate the decision shall be filed with the court in which the action is pending, and shall be served in accordance with the [jurisdiction's statutes or rules of civil procedure.]

(2) If no action is pending in any court, the decision may be confirmed, corrected, or vacated by petition to the court having jurisdiction over the amount of the decision, in accordance with the [jurisdiction's statutes or rules of civil procedure.]

(3) A court confirming, correcting or vacating a decision under these rules may award to the prevailing party reasonable fees and costs including, if applicable, fees or costs on appeal, incurred in obtaining confirmation, correction or vacation of the award. The party obtaining judgment confirming, correcting, or vacating the decision shall be the prevailing party except that, without regard or consideration of who the prevailing party may be, if a party did not appear at the arbitration hearing in the matter provided by these rules, that party shall not be

entitled to attorney's fees or costs upon confirmation, correction, or vacation of the award.

Comment

Thirty days is considered a reasonable time period in which to expect the parties to comply with the decision. The thirty days begins to run when the decision in the fee arbitration process is served on the parties or when a settlement agreement is signed.

The Commission itself has no authority to enforce a decision. Either party may use the summary action mechanisms which are provided by the jurisdiction to obtain a judgment consistent with the panel's decision as expeditiously as possible.

Reasonable fees and costs may be awarded to the prevailing party in an action to confirm, correct or vacate a panel decision, unless the prevailing party failed to appear at the arbitration hearing in the manner provided in the rules. This exception should encourage full participation of the parties in the arbitration proceeding.

Every jurisdiction is encouraged to consider developing means of assisting clients in enforcing decisions. Some jurisdictions use a panel of pro bono lawyers to assist the clients in obtaining civil judgements. Some jurisdictions refer lawyers who fail to comply with a decision or judgement to an appropriate agency for administrative, non-disciplinary action such as that used in the jurisdiction for failure to comply with mandatory continuing legal education requirements or failure to pay registration fees.

Rule 8. CONFIDENTIALITY

A. Confidentiality of Proceedings. Except as may be otherwise necessary for compliance with these rules or to take ancillary legal action with respect thereto, all records, documents, files, proceedings and hearings pertaining to the arbitration of any dispute under these rules shall be confidential and will be closed to the public, unless ordered open by a [court of general jurisdiction] upon good cause shown, except that a summary of the facts, without reference to the parties by name, may be publicized in all cases once the proceeding has been formally closed.

B. Confidentiality of Information. A lawyer may reveal information relating to the representation of the client to the extent necessary to establish his or her fee claim. In no event shall such disclosure be deemed a waiver of the confidential character of such matters for any other purpose.

Comment

Rule 8.B is consistent with ABA Model Rule of Professional Conduct Rule 1.6 or its equivalent, which permits limited disclosure of otherwise confidential information only

"to the extent reasonably . . . necessary to establish a claim or defense . . . in a controversy between the lawyer and the client . . .."

Rule 9. IMMUNITY

A. Parties and Witnesses. Parties and witnesses shall have such immunity as is applicable in a civil action in the jurisdiction.

B. Commissioners; Arbitrators; Staff. Members of the Commission, panels and staff shall be immune from suit for any conduct in the course and scope of their official duties.

Rule 10. SERVICE

A. Method. Service on any party other than a lawyer or law firm shall be by personal delivery, by any person authorized by the Chair of the Commission, or by deposit in the United States mail, postage paid, addressed to the person on whom it is to be served at his or her office or home address as last given to the Commission.

B. Official Address of Lawyer. Service on an individual lawyer shall be at the latest address shown on the official membership records of the [highest court or state bar association.] Service on a law firm shall be at the address as shown in the Petition for Arbitration Form unless the law firm designates a lawyer to be responsible for the arbitration, in which case, service shall be at the designee's latest address shown on the official membership records of the [highest court or state bar association.] Service shall be in accordance with section 10.A. above.

C. Service on Represented Parties. If either party is represented by counsel, service shall be on the party as indicated in Rules 10.A. and 10.B. , and on the counsel at the latest address shown on the official membership records of the [highest court or state bar association.]

D. Completion of Service. The service is complete at the time of deposit. The time for performing any act shall commence on the date service is complete and shall not be extended by reason of service by mail.